No. 94.
Motion as to return to writ of Certiorari.
Filed Dec. 9, 1901.

FILED
DEC 9 1901
JAMES H. McKENNEY,
Clerk

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 94.

THE HUGULEY MANUFACTURING COMPANY ET ALS., APPELLANTS,

vs.

THE GALETON COTTON MILLS ET ALS., APPELLEES.

Motion That Transcripts of Records on File Be Accepted by the Court as a Sufficient Return to the Writs of Certiorari Ordered in This Case.

JOHN T. MORGAN,
Attorney for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1423

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 94.

THE HUGULEY MANUFACTURING COMPANY ET ALS., APPELLANTS,

vs.

THE GALETON COTTON MILLS ET ALS., APPELLEES.

Motion That Transcripts of Records on File Be Accepted by the Court as a Sufficient Return to the Writs of Certiorari Ordered in This Case.

The appellants in this case move the court that the transcripts of record marked Exhibits A and B to the affidavit of William T. Huguley filed in this case, bearing date the 18th of November, 1901, be taken as a sufficient return to the writs of certiorari ordered by the court; and in support thereof they state the following facts:

1st. The original transcripts of records, of which said exhibits are printed copies, were certified by the clerk of the United States circuit court for the northern district of Georgia

on appeals taken in this cause from said circuit court to the circuit court of appeals for the fifth circuit as being true copies of said records.

2d. Said transcripts are the same that are referred to in the agreement of counsel in this case, dated July 14, 1899, and copied on pages 5 and 6 of the transcript of record filed in this cause on the 25th of June, 1901.

3d. That appellant, William T. Huguley, on the 26th of November, 1901, sent complete and correct printed copies of said Exhibits A and B to the clerk of said circuit court of appeals, who received the same by mail, with the request that said clerk would certify the same to the Supreme Court as a return to the certiorari ordered in this cause, and said clerk has refused to make such certificate, for the reasons stated in the following letter to William T. Huguley:

Copy.

Nov. 26, 1901.

Mr. J. MARTIN MCKEE,
Acting Clerk U. S. Circuit Court of Appeals,
New Orleans, La.

MY DEAR MCKEE: Senator Morgan authorizes me to request you to compare the two transcripts of records expressed to you this date, viz., volumes 1 and 2, with those you have on file under our original appeal and under our second appeal from the circuit court of the United States for the northern district of Georgia (*vide* Fuller, clerk's certificates), and after satisfying yourself that these two copies are duplicates of the originals preserved in your files, then forward us by first return mail your certificate accordingly, as per copy accompanying, framed by Senator Morgan to meet the facts and the purpose for which he wishes these two original transcripts to be thus identified.

I am gratified to report that, at yesterday's session of the U. S. Supreme Court, the Senator's motion suggesting diminution of the record and praying for certiorari to complete the record, was duly granted, and our hearing on the complete record is set down for early in January.

As no time is to be lost, see to it that your certificate, with these two sample copies as suggested, are returned forthwith, and we will appreciate your promptness.

In looking through your files, should you find any of these records (vols. 1 and 2), other than the one of each you have to retain under your rules, and can spare us same, it will be a very great favor to us if you would kindly return same with these two sample copies expressed.

I have filed some 8 or 9 of vol. 1, and 16 or 17 copies of vol. 2, with the clerk of the Supreme Court, but we need a few more. I have told the Senator I could trust you to act promptly.

Truly, WM. T. HUGULEY.

NEW ORLEAN, LA., *November* 29, 1901.

WM. T. HUGULEY, Esq., *Washington, D. C.*

DEAR SIR: I have your favor of 26th inst., in reference to certifying to two copies of record which I have today received per express.

I find that the cost for giving my certificate to these two volumes will be approximately $294.40, and as I am responsible for all costs earned in this office whether collected or not, I should prefer to receive N. Y. or N. O. exchange for this amount before sending out copies.

Very truly yours,

CHARLES H. LEDNUM, *Clerk.*

4th. That the sum of $294.40, claimed by the clerk of the circuit court of appeals for certifying said copies of the records of said circuit court, is not warranted by the law or

the practice of the Supreme Court in such proceedings and is unjust.

5th. That the attorneys of record for the appellees in this case, being requested by the attorney of the appellants to admit that said Exhibits A and B, on file in this court, are, according to the purport thereof, true copies of the records of the circuit court of the northern district of Georgia, that are referred to in the agreement of counsel in this case in said circuit court of appeals, as set forth on pages 5 and 6 of the record thereof filed in the Supreme Court, have refused to make such consent or any consent on the subject.

6th. That if the Supreme Court should require said Exhibits A and B to be copied out, from the records of said court, by the clerk thereof, it would take a longer time to make such copies than will elapse until this case is reached in its regular call on the docket, for hearing, and the expense thereof will be unnecessary, for the purposes of justice, or as a compliance with the rules and practice of the court, and will increase the costs in this case unnecessarily.

JOHN T. MORGAN,
Attorney for Appellants.

Comes William T. Huguley, one of the appellants in the case stated in the foregoing motion, before the undersigned, a notary public of the District of Columbia, and, being by me duly sworn, he states on oath as follows:

That the letter set forth in this motion, from the clerk of the circuit court of appeals for the fifth circuit, and addressed to affiant, was received by due course of mail and is in reply

to a letter addressed by him to the acting clerk, which is therein referred to.

That he sent to said acting clerk a copy, in print, of Exhibits A and B, which are appended to his former affidavit filed in this case, and requested him to certify the same as parts of the record in this case, that were designated in the agreement of counsel set forth on pages 5 and 6 of the record in this case, and formed part of the record thereof upon the last hearing in the circuit court of appeals for the fifth circuit.

The copies of Exhibits A and B, in print, that affiant sent to said clerk are the same referred to in the letter above incorporated in this affidavit. Affiant carefully compared these documents, and he believes that they are true copies of said Exhibits A and B, on file in this case, and the same are still in the possession of the clerk of said circuit court of appeals.

Affiant obtained these prints from the counsel who had formerly represented these appellants in this case in the circuit courts of appeals, and he has had no opportunity of comparing them with the original records; but he states that they are copies of the same prints that are referred to in said agreement of counsel set forth on pages 5 and 6 of the record in this cause, that were used, under said agreement, on the hearing of this cause in the said circuit court of appeals.

None of said copies obtained by affiant were perfect, for the reason that his counsel in making up their briefs in this case in said circuit court of appeals on the last appeal had taken clippings from them, but affiant found enough copies of the original print to enable him to supply all of

these clippings and to reproduce, in the original print, full and complete copies of the same in the form that they were used on the hearing of this case in the circuit court of appeals, so that said Exhibits A and B and the copies thereof which affiant sent by mail to the clerk of the circuit court of appeals, as above stated, are true copies of the printed transcripts referred to in the agreement of counsel on pages 5 and 6 of the record in this case and were parts of the record that were referred to by counsel of all the parties in this case and by the circuit court of appeals on the hearing of this case, and also on each of the two appeals previously taken therein from the circuit court of the northern district of Georgia to the circuit court of appeals.

Affiant was advised by his counsel in these several appeals that they were necessary for the obtaining of his just rights in this litigation and he has never in any instance attempted to hinder, delay, or obstruct the speedy hearing and decision of any question or issue in this entire proceeding.

The earliest proceedings had in this case in the nature of orders and decrees therein swept him out of the use and possession of a property of great value and money-earning capacity, his interest in which was his source of living and comprised almost his entire property. He has been compelled to work very hard and to tax the generosity of his friends severely to obtain the means of defending what he believes to be his just legal and equitable rights and those of the bondholders of this trust estate, until his means are exhausted and his credit is nothing more than the indulgence of his friends, who have faith in his integrity and in the justice of his defense in this case.

Affiant attaches to this affidavit, as parts thereof, recent correspondence between his attorney of record on this appeal, who has had no previous connection with this case, and the attorneys of record for the appellees, which shows the efforts to reach an agreement as to the return to the certiorari ordered by the court and the result of that effort, as follows:

WASHINGTON, D. C., *Nov.* 25, 1901.

Messrs. BRANDEIS & DUNBAR,
Boston, Mass.

GENTLEMEN: The enclosed memorandum was prepared by the clerk of the Supreme Court and states the action of the court in the case of The Huguley Manufacturing Company, The Alabama and Georgia Manufacturing Company and William T. Huguley, *vs.* The Galeton Cotton Mills, J. J. Robinson, trustee, L. Lanier and others, No. 94, on the Supreme Court docket. The appellants placed on file in this case two printed records sent up on former appeals in this case from the circuit court of the northern district of Georgia, which I showed your Mr. Brandeis. They are certified by the clerk of said circuit court, and were before the circuit court of appeals, by stipulation of counsel, as parts of the record on which this case was heard in said circuit court of appeals. The first of these transcripts was certified by Olin C. Fuller, clerk of the circuit court of the United States for the northern district of Georgia, on the 9th December, 1892, and contains 193 pages of printed matter. The second was certified by the same clerk on the 27th day of July, 1895, and contains 300 pages of printed matter.

These transcripts, with that on file in this cause, comprise the entire record in this cause that was before the circuit court of appeals when it was heard on the 17th and 18th days of April, 1899.

To avoid the great and needless expense of having these two certified transcripts copied by the clerk of the circuit court of appeals, in which court they are filed as papers in this cause, I respectfully request that you will agree that the copies that are on file in the office of the clerk of the Supreme Court shall be taken and considered as a return to the writ of certiorari, in this case, ordered by the Supreme Court.

Will you kindly inform me, at your earliest convenience, whether you will agree to the above proposition?

I enclose a stipulation embodying the same.

Very respectfully, JOHN T. MORGAN,
Attorney for Appellants.

Memorandum.

(Copy.)

No. 94.

Nov. 26, 1901.

Motion to dismiss postponed to hearing on merits.

Certiorari granted without prejudice. Duly certified copy of record sought to be supplied may be filed as return to the writ.

Stipulation.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1901.

THE HUGULEY MANUFACTURING COMPANY, THE ALABAMA AND GEORGIA MANUFACTURING COMPANY, and WILLIAM T. HUGULEY, *Appellants*, *vs.* THE GALETON COTTON MILLS, J. J. ROBINSON, *Trustee*; L. LANIER, and Others, *Appellees*. } No. 94.

Nov. 26, 1901.

In this case it is stipulated by the attorneys of the appellants and of the appellees, respectively, that the two transcripts of record filed in this cause and certified by the clerk of the circuit court of the United States for the northern district of Georgia, as transcripts of the record of the proceedings in this cause in said circuit court, one of which certificates is dated the 9th of December, 1892, and the other is dated the 27th of July, 1895, shall be taken and considered as a return to the writ of certiorari issued in this cause, duly made and certified in accordance with the order of the Supreme Court.

—— ——,
Attorney for Appellants.

—— ——,

—— ——,
Attorneys for Appellees.

NOVEMBER 26, 1901.

220 Devonshire Street,
Boston, Mass., *November* 29, 1901.

Re Riverdale — Huguley. G/B.

Hon. John T. Morgan,
United States Senate, Washington, D. C.

Dear Sir: I am in receipt of your letter of the 25th, and have just wired you as follows: "Your letter twenty-fifth received. Cannot sign stipulation. Have written."

When I was in Washington on the 11th, you showed me two records which you held in your hands and said were the records in the circuit court of appeals on the first and second appeal, and pointed out to me that those copies of the record were mutilated copies, some portions having been cut out. I did not have these copies of record in my own hand, and of course have not examined them. I have not myself any copy of the record of this case in the circuit court of appeals on the first and second appeal, and I understood from you that you had no copies that you could furnish me.

I understood when you addressed the court on the 11th about the filing of additional papers which you were to have printed, that you proposed to have duly certified copies of the records in the circuit court of appeals on the first and second appeal printed and filed with your petition, and I accordingly wrote the clerk of the Supreme Court to send me copies of such additional papers as you might file. He wrote me under date of November 19th that he was unable to furnish me copies of Exhibits "A" and "B" referred to in Mr. Huguley's affidavit filed November 18th, 1901, which exhibits I assume to be the records on the first and second appeal to which you now refer.

I am not familiar with these records. I must leave you, therefore, to a strict compliance with the rules and order of the court in this respect.

Yours very truly, Louis D. Brandeis.

This day came before the undersigned, a notary public for the District of Columbia, William T. Huguley, one of the appellants in the above-stated case, who, being by me duly sworn, states that the matters stated in the foregoing motion are true when stated as of his own knowledge, and when stated upon information and belief, he believes the same to be true.

Sworn to and subscribed before me on this the — day of December, 1901, as witness my hand and notarial seal.

Notary Public.

Supreme Court of the United States.

OCTOBER TERM, 1901.

Filed Oct 17, 1901.

No. 44.

THE HUGULEY MANUFACTURING COMPANY, WILLIAM T. HUGULEY, AND THE ALABAMA AND GEORGIA MANUFACTURING COMPANY

v.

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER.

Statement of the Case, Assignment of Errors, Argument, and Brief Relating to the Motion for Certiorari to Bring up a Complete and True Record, and as to the Appeal in This Cause.

JOHN T. MORGAN,
Attorney for Appellants.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 902

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 94.

THE HUGULEY MANUFACTURING COMPANY, WILLIAM T. HUGULEY, AND THE ALABAMA AND GEORGIA MANUFACTURING COMPANY

vs.

THE GALETON COTTON MILLS, J. J. ROBINSON, TRUSTEE, AND L. LANIER.

Statement of the Case, Assignment of Errors, Argument, and Brief Relating to the Motion for Certiorari to Bring up a Complete and True Record, and as to the Appeal in This Cause.

I.

1. The petition for certiorari, to perfect the record, sets out the deficiencies in the transcript certified by the clerk of the court of appeals, and it presents a certified copy of the record which supplies the parts omitted, as far as is possible in the state of the record in this cause, in the circuit court of the northern district of Georgia and in the circuit court of appeals for the fifth circuit.

2. The facts to be supplied to perfect the transcript being matters of record in said courts, they are sufficiently established by the certificates of the clerk of the court of appeals, and they are verified in the affidavit filed in this cause on behalf of the appellants.

3. But the *imperfections* of the record certified in this cause, which may be the result of clerical errors, are such that it requires the action of a court to correct them, because they consist in a discrepancy and contradiction between the minutes of the circuit court of appeals (on page 98 of the record), and the appeal, and the allowance thereof, and the proceedings thereon, and the record of the opinion of the court of appeals, on pages 99 to 111, inclusive.

II.

The appellants have not had the right, nor is it their duty, to apply to the circuit court of appeals for the amendment or correction of a decree that is adverse to them, in order to sustain its validity.

III.

1. The findings of facts, as stated in the opinion of the circuit court of appeals, on which its judgment is based, go back to a bill that was filed by J. J. Robinson to foreclose a mortgage made on the first day of January, 1884, by the Alabama and Georgia Manufacturing Company, and a sale of the mortgaged property under a decree of a State court, at which the Huguley Manufacturing Company was the purchaser, and was placed in possession of the property.

The first alleged default in the payment of interest on the bonds was on January 1, 1891, and the bill for foreclosure was filed in that month.

2. The property was sold under a decree in this cause, which was subsequently reversed, and it was so incomplete that it could not have been complied with. The property was purchased by the Galeton Cotton Mills. The possession of the property was delivered to this purchaser, and the Huguley Manufacturing Company was ousted from the possession by the decree that was so reversed.

3. The Galeton Cotton Mills were in possession of the mortgaged property for three years and eight months under the decree of foreclosure that was reversed.

4. The circuit court of appeals in their findings and decree state that "the property embraced in the mortgage was sold under a decree of a State court subject to the mortgage. Under this sale the Huguley Manufacturing Company became the purchaser and owner of the property, subject to the incumbrance of the mortgage for about $65,000," before this bill was filed.

5. This decree of a State court and the sale under it, which conferred the ownership of the property on the Huguley Manufacturing Company, subject to the mortgage, is not in the record certified to the Supreme Court.

6. On page 14 of the record now before the court an amendment of a petition is set out which indicates that the Huguley Manufacturing Company had, at some previous

term of the court, intervened for its rights by petition, but that original petition and the proceedings under it are not found in the record.

7. The "owner of the property" was kept out of possession for three and two-thirds years by a purchaser under a decree of foreclosure that was reversed, and the court of appeals say that "the real controversy in the present litigation is about the rents of property during this period." And the court declined to consider any other of the many questions that were assigned for error.

If this were the only material question in the case, the pleadings and proofs on which it was decided should appear of record; yet neither the original bill, nor the proceedings thereon, nor the decree that was reversed, nor the proceedings by petition, based on that reversal, nor a copy of the decree or proceedings of the State court, nor the conditions imposed upon the Huguley Manufacturing Company, to which objection was made, nor the proceedings on that litigation, nor the mortgage out of which this entire controversy originated, are set out in the record in this cause.

8. The court of appeals say, in their opinion:

"We are relieved from stating these questions and the facts relating to them, more minutely, by the opinions of the learned judge who rendered the decrees appealed from in the circuit court. Those opinions will appear in the report of this case."

The opinion of the judge who rendered the decree of March 30, 1895, which was affirmed on appeal to the circuit court of appeals on the 14th of January, 1896, is not in the record. (See Record, pages 6 to 11, inclusive.)

Nor is any opinion of the learned judge on any proceeding before that date, or of the circuit court of appeals in respect thereof, set out in the record; so that the facts as they were found by the judge of the circuit court are not otherwise in this record.

9. On the 23d of February, 1898, the judge of the circuit court rendered an opinion and decree in this case, which is set forth on pages 46 to 53 of the record. The findings of facts in that opinion are thus stated:

"The greater part of the previous history of this case can be found in the opinions of the court in Robinson, trustee, *vs.* The Huguley Mfg. Co. *et al.*, 51 F., 268; 56 F., 690; 67 F., 189; 72 F., 708.

"After the last decision of the appellate court as reported in 72d F., 708, *supra*, the property was sold under the last decree and bought by the same purchasers as at the former sale."

In a subsequent decree of Judge Newman in this cause, rendered April 11, 1898 (Record, pages 55 to 61), the court states as follows:

"In order to make clear what is now for hearing and determination in this case, it is probably best to give a brief statement of what has occurred before, during the progress of the case.

"On the 21st day of January, 1891, J. J. Robinson, trustee, filed a bill in this court against The Alabama and Georgia Manufacturing Company, The Huguley Manufacturing Company and W. T. Huguley for the purpose of foreclosing a mortgage executed by the Alabama and Georgia Manufacturing Company to Huguley, Yancey and Robinson as trustee. Yancey was dead. Huguley's interest was alleged to be ad-

verse to that of the bondholders, so that Robinson filed the bill alone and made Huguley a party defendant. The foreclosure was for default in the payment of interest; the defense was that the interest was tendered within the time required, and that under the facts complainant was not entitled to a foreclosure.

"A decree was rendered foreclosing the mortgage, in the circuit court, which was reversed in the circuit court of appeals, not because of any error in the decision of the court that complainant was entitled to foreclosure, but on the ground that there had been no accounting as to the bonds on which interest had been paid, and those on which interest had not been paid.

"In the meantime, and pending the appeal, the property had been sold and had been bought in for the bondholders by a committee representing their interests. The case coming back to the circuit court, the Huguley Manufacturing Company demanded restitution, which was awarded on certain conditions, which conditions were not complied with.

"The case was referred to a master, an accounting was had and a decree subsequently rendered foreclosing the mortgage for $45,000 principal and $17,005.92 interest, with costs. Under this decree the property was sold for $66,000. Afterwards the property was again sold and bought by the former purchasers, that is, by the mortgage bondholders. There had elapsed between the first and second sales three years and eight months.

"An application was made to the court by the Huguley Manufacturing Company to require the purchasers to account for the rents and profits during the time of their possession under the first sale and before the second purchase. An order was granted to this effect and a master was appointed to hear evidence and take an account. The master, after a lengthy hearing, reported the amount of the rents and profits during the three years and eight months, which report, after slight modifications, was approved for $35,875.53. Judgment had

been rendered in favor of Robinson, trustee, for any deficiency between the amount of his debt and the amount the property brought at the sale.

"This deficiency is a few thousand dollars more than the amount of the rents and profits found by the master against the purchasers.

"Motion is now made by the purchasers, who, as stated, are the bondholders, to set off the amount found for rents and profits during the time of their possession between the two sales, against the amount of the deficiency decree. This is resisted by the Huguley Manufacturing Company; it is claiming rents and profits, and that is the question now presented for determination.

"The mortgage under which the property was sold was made by the Alabama and Georgia Manufacturing Company in January, 1884. Subsequently, by reason of some litigation in the State court, the property of the Alabama and Georgia Manufacturing Company went into the hands of a receiver, and was sold and bought by persons who afterwards organized the Huguley Manufacturing Company, they buying at receiver's sale subject to the mortgage of Robinson, trustee."

IV.

The matter above quoted is all that the record now before the court contains showing any statement in the several decrees of the judge of the circuit court, as to facts found by him in this cause. These statements of findings could not have relieved the appellate court from its duty of showing by the record, the pleadings, proceedings, and facts in the cause upon which its judgment is based.

V.

1. The record contains fifty-six assignments of error, on pages from 79 to 95, which were filed in the circuit court of the northern district of Georgia, on the 2d day of December, 1898, of which due and legal service was acknowledged by solicitors for the appellees, on the same day.

2. These assignments were based upon the entire record in the case of J. J. Robinson, trustee, against The Alabama and Georgia Manufacturing Company and William T. Huguley, defendants, and the collateral proceeding on the intervention, by petition, of the Huguley Manufacturing Company.

But the record in said cause, being case No. 360, in equity, on the docket of said circuit court, was not certified to the circuit court of appeals for the fifth circuit.

3. The assignments of error so made, and especially those numbered from XXV to LVI, both inclusive, went to the merits of the entire case and pointed out fatal defects in the equity of the original bill, which, for the want of indispensable parties to the suit, compelled the court in its decree of March 30, 1895, which was affirmed in the circuit court of appeals, to decree in favor of the trustee for the benefit of certain bondholders for whose benefit he prosecuted his complaint, and against other bondholders under the mortgage, none of whom were represented on the hearing or in the pleadings in the cause.

4. It appears from the decree of March 30, 1895, by necessary inference from the matters therein stated, that, in his

original bill. J. J. Robinson, as trustee, having no other right to a standing in court, pretended to represent the holders of all the mortgage bonds, 130 in number. The bill was filed in January, 1891, upon the ground that the non-payment of interest on the 130 bonds, which was due on July 1, 1890, made the principal of the bonds to fall due after six months from July 1, 1890.

5. In his haste to enforce his supposed authority, and evidently to sustain the effort of a *part* of the bondholders, whom he really represented, to capture the mortgaged property without reference to the rights of *other* bondholders, he proceeded with his suit, and when it was brought to a hearing, it was ascertained that the holders of 40 of the bonds, of the face value of $20,000, some of whom were dead and others were married women, to use the language of the decree in paragraph 2, they had "accepted the interest on said bonds, and by accepting them had waived the default, and the principal of said bonds, amounting to the aggregate sum of twenty thousand dollars, was *not* due and payable at the date of the filing of this suit, and that said trust deed *cannot* be foreclosed for the amount of said forty bonds."

6. This declaration of the court would necessarily have dismissed the bill, unless the cause was stopped and the bill was amended so as to bring in these bondholders as parties defendant to protect their rights in the mortgaged estate.

This presented at once a question of the jurisdiction of the court to proceed in the cause in the absence of indispensable parties, whose rights the court had ascertained and declared in its decree.

This question controlled all the subsequent proceedings in the cause, which proceedings further develop the fact that this was from the beginning an effort of some of the bondholders to use their power, as such, to force a sale of the mortgaged premises under conditions that would enable them to own the property, and either throw out the bonds they did not own, or control the price of them and buy them up on their own terms.

7. The following parts of the decree of March 30, 1895, were a basis for such plans, and the conduct of the "Galeton Cotton Mills" Company, a corporation organized by these select bondholders to hold and manage the property, was an adroit execution of these purposes.

8. In paragraph 3 of that decree "the court finds that the interest *was not accepted* on the remainder of the bonds, ninety in number, to wit (stating the number of each bond), and said default, as hereinbefore found to have occurred, was not waived and said trust deed can be foreclosed for the amount due on said ninety bonds, the principal due thereon being the sum of forty-five thousand dollars, with accrued interest." In paragraphs 4 and 5 of the decree the court names the owners of each class of the bonds issued under the mortgage, but does not state their citizenship or places of residence. The court finds the principal and interest due on the bonds and coupons of both classes up to November 1, 1894, which in the aggregate amounted to $85,457.16. The amount found due to the bondholders who had not accepted interest on their bonds was $62,005.92, and the amount due

to those who had accepted interest on their bonds before Robinson filed his bill was $23,451.24.

9. The court thereupon proceeds, in paragraph 6, to decree as follows:

"And it is further adjudged and decreed that the plaintiff do recover of and from the said Alabama and Georgia Manufacturing Company the said sum of forty-five thousand dollars principal and seventeen thousand and five and $\frac{92}{100}$ dollars for interest up to the 1st day of November, 1894, with all accruing interest from said date until paid, at 8 per cent. per annum and dollars as costs of this cause, the said sums to be satisfied out of the mortgaged premises hereinafter described, that is to say: All of a large island in the Chattahoochee river, designated as Island No. 6, containing one hundred and forty-three acres (143), more or less. Also Island No. 9, containing seven (7) acres, more or less. Also a small island between No. 6 and No. 9, upon which the east end of the factory building rests, containing four (4) acres, more or less. All of said three above-described islands being in the 20th district of Harris county, Georgia.

"Also a tract or parcel of land lying on the west side of the Chattahoochee river, opposite the above-described islands, bounded on the east by said river, beginning at a point on the west bank of said river, nearly opposite the center of the seven (7) acre island, at a black gum, at or near a place known as Sell's Corner; thence in a straight line to a point where the land owned in 1868 by Mrs. Freeman, Job Ross and James Campbell joins, known as the Ross and Freeman corner, to a pine stake; thence in a line to a branch near said stake; thence in a line down said branch to said river; thence down the western bank of said river to the beginning point, containing sixty-five and $\frac{23}{100}$ (65.23) acres, more or less, *lying and being in Chambers county, State of Alabama*, and

being a part of section twenty-eight and section twenty-nine (28 and 29) township twenty-one (21), range twenty-nine (29), as well as a forty (40) foot right of way from factory building to the public road from West Point, Georgia, to Berlin, Ala., at any point where the factory company may locate it, *including all tenements and improvements, including the cotton mill and machinery therein or thereto belonging, and all water privileges and riparian rights now or hereafter owned or enjoyed by said Alabama and Georgia Manufacturing Company.*"

10. In paragraph 7 of the decree—

"It is further ordered and decreed that the remainder of said bonds, to wit: forty in number, which are numbers set out in paragraph 2 of this decree, for the aggregate principal sum of twenty thousand (20,000) dollars, and for the sum of three thousand four hundred and fifty-one and $\frac{24}{100}$ dollars, interest thereon to November 1, 1894, were *not* due at the time of the filing of this suit, and said plaintiff, as trustee, is *not* entitled to recover therefor."

11. In paragraph 8, the equity of redemption is forever barred to the defendant corporation, and to every one claiming under or through it since the date of the execution of the trust deed or mortgage, to wit, the 2d day of January, 1884.

12. In paragraph 9 the decree directs the sale of the mortgaged property by Samuel C. Dunlap, who is appointed a commissioner for that purpose, on the 4th of June, 1895, "to the highest bidder," unless the $45,000 principal and $17,005.92 and all accruing interest thereon, at 8 per cent., and the costs of this cause are paid by the defendant company into court within thirty days from the date of the decree. If the purchaser should not represent a majority

in amount of the outstanding bonds of the company, the decree requires him to pay into the hands of the commissioner $10,000 to insure compliance with his bid in case the sale is confirmed. If a bondholder bids off the property "for or on behalf of the holders of a majority of the bondholders, in amount, then such purchaser shall not be required to pay more than $5,000 to the commissioner to cover costs, fees, and expenses of sale. If any bondholder bids off the property, he shall be entitled to pay the balance of the costs in and with the bonds of the company, whether the same have matured or not, "in the proportion and to the extent that such bonds would be entitled to share in the proceeds of sale if all the purchase-money was paid in cash."

13. Paragraph 11. "In case the property is sold and the proceeds *is* brought into court for distribution, then and in that event the bonds hereby decreed not to have matured at the time of the filing of this bill, which bonds are described in section 2, of this decree, are hereby entitled to share in the proceeds of said sale on distribution in amounts according to the findings of the special master, with all accruing interest and the holders and owners of said bonds may present them with the coupons attached for their proper *pro rata* share of said proceeds according to their tenor and effect."

14. Then follows this remarkable addendum:

"The court being of the opinion that the property decreed to be sold is *indivisible* and cannot be sold to satisfy that portion of the bonds which are hereby decreed to have matured, without destroying the value of the property as security for said bonds, and it further appearing that the defendant is insolvent and has ceased to do business: and

it further appearing that said bonds described in the 2d paragraph of this decree have become due since the filing of the bill by reason of the non-payment of interest."

15. The court in paragraph 12 of its decree reserves full control of the rights of purchasers under the decree and the right to make any further order or decree "in conformity with the general scope hereof" in respect of "the entries of credits on said bonds and the control of the same as shall appear proper on final distribution." As to those matters, and as to the costs in the court of appeals, the decree is not final, but it awards execution "for any balance of said sums hereby adjudged to be due which may remain after the sale of said property."

16. How far this decree is sustained by the pleadings in case "No. 360, in equity," of J. J. Robinson *et al. vs.* Alabama and Georgia Manufacturing Co. *et al.* is not shown by this record. On the face of the decree, the want of jurisdiction of the circuit court of Georgia to render it is manifest in at least three particulars:

1. That it disposes of the rights and securities that belong to the holders of forty bonds, amounting, without interest, to $20,000, who are excluded from any hearing in the cause and are afforded no opportunity to prove their claims and are indispensable parties to the suit.

2. That it decrees the sale of lands in Alabama, "including the cotton-mill plant located thereon," wholly without and beyond the limits of the jurisdiction of the circuit court of the northern district of Georgia.

3. That the court awarded execution against *all* the defendants in the cause "for any balance of said sums hereby adjudged to be due," without reference to the sums that were *not* due at the filing of the bill, and without reference to the decree, in the sixth paragraph, that the plaintiff "recover of and from the Alabama and Georgia Manufacturing Company," and not from any other defendant in the case, "the sums of $45,000 as principal and $17,005.92 interest up to the 1st day of November, 1894, with accruing interest on said principal from said date until paid, at 8 per cent. per annum," thus compounding the interest without lawful cause.

VI.

The date of the first decree in the record of this cause now before the Supreme Court is that of the decree of Newman, judge, set forth in the mandate of the circuit court of appeals, viz., March 30, 1895. In the last decree of Judge Newman in this case, on the 15th of October, 1898 (Record, pages 72–74) he refers to a sale of the property involved in this case which was made to *L. Lanier*, under a decree of 6th of September, 1892.

So that, in tracing the statement that this suit and all the proceedings in it were set on foot by a portion of the bondholders in order to capture this property and its great water power, which, it is insisted, appears from the course of proceedings in this cause, and is contested by petitions and answers, motions, exceptions, and assignments of error that appear of record in all its stages, it is indispensable that the entire record in the case should be brought before this honorable court.

The proceedings in this cause since March 30, 1895, are correctly stated, with the exceptions noted in this statement, and prior to said date they are correctly stated in the certified transcript submitted with the appellants' motion for a certiorari to perfect the record, with some omissions that are accounted for in the stipulation of counsel (Record, pages 5, 6), which is hereinafter explained.

VII.

1. The assignments of error on pages 79 to 95, inclusive, on the record sent up to the Supreme Court and certified on the 15th of May, 1901, and the assignment of errors on pages 62 to 65 of the record certified on the 6th day of October, 1899, submitted to the court, apply to the phases of the case in which the appellants believe that errors were committed in said cause in the circuit court, in the progress thereof.

2. Until the entire record in this case is before the Supreme Court, the appellants cannot properly assign the errors in the judgments of the circuit court of appeals that affirmed the several judgments of the circuit court of the northern district of Georgia in this case, and support the assignments by the record.

3. On the partial record now before the court enough appears to sustain the statement that the powers and process of the circuit court of the northern district of Georgia have been used and unlawfully abused by the corporation called the Galeton Cotton Mills and by the persons who organized the same for the purpose of obtaining the title and possession of the mortgaged property, which is the essential

subject-matter of this suit. This is shown in the following proceedings in connection with what is hereinabove stated, viz: In the decree of March 30, 1895, the court appointed Samuel C. Dunlap a commissioner to sell the mortgaged property at public sale, and give to those persons who organized the Galeton Cotton Mills such advantages in the payment of their bid for this great property that no other bondholders and no outsiders could successfully compete in bidding for the purchase of the property, the actual value of which was far in excess of the bonded debt secured by the mortgage.

4. The property was sold by the commissioner, against the petition and remonstrance of the Huguley Manufacturing Company, on the first Tuesday in May, 1896, and "the same was bid off by L. Lanier, representing, as he *claimed*, a majority of the bondholders of said defendant company, for the sum of $66,000."

Of this sum there was paid for advertising the property $46.97; commissioner's fees for selling it, $200, and $4,753.03 in the hands of the commissioner, and the balance, $61,000, "in the hands of the purchaser uncollected" (Record, page 20).

5. In the decree of the circuit court of 15th of October, 1898 (Record, pages 72–74), it is stated that "on the 6th of September, 1892, L. Lanier *et al.*, for and on behalf of the bondholders bid in said property at and for the sum of $10,000 and paid into court on said purchase the sum of $10,000, which sum was distributed under and by order of this court

before any notice of appeal was given, and before any reversal of the decree under which said sale was made."

6. L. Lanier is the same person who bought the property in 1892, and he bought it for persons who were the corporators, organizers, and owners of the stock in the Galeton Cotton Mills, and they took possession of the property under that sale and have held it from that time to this. But it is an error which the record proves, that Lanier bought the property for $10,000. He bid it in for $66,000 at that sale and for the same sum at the sale on the 6th of May, 1896.

7. On the 1st of May, 1896, the Alabama and Georgia Manufacturing Company and The Huguley Manufacturing Company petitioned the court for a postponement of the sale for 60 days, under the decree of March 30, 1895. The petition is verified by oath, and is also verified by the record in the cause, and presents a very strong case. (Record, pages 16–18.) On the 2d of May the court refused the petition.

On the 7th of May, 1896, Samuel C. Dunlap filed his report of the sale of the property, under the decree of the court, in which he says:

"And on the first Tuesday in May, 1896, I sold said property at public outcry before the court-house door in the town of Hamilton, in Harris county, in said district, it being the county in which said property is located, when the same was bid off by L. Lanier, representing a majority of the bondholders of said defendant company, at and for the sum of $66,000. The said purchaser paid over to me at the time and place of the sale the sum of five thousand dollars, as required by the terms of the decree, for which he holds my receipt."

8. On the 27th of May, 1896, L. Lanier presented his petition for the confirmation of said sale, in which he states "that your petitioner, for and on behalf of the holders of the bonds of the Alabama and Georgia Manufacturing Company, bid off said property at and for the sum of 66,000 dollars; that he paid into the hands of said commissioner on the spot the sum of 5,000 dollars, as in said decree provided for. Petitioner is ready to surrender the bonds of said company in payment of the balance of the purchase-money, on confirmation of the sale, all of the bonds being legally or equitably the property of your petitioner and his associates and under their control."

9. Under an order of court made on the 27th of May, 1896, the defendants in the suit were required to show cause before the judge on the 30th of May, why it should not be granted. The defendants filed their answers to the petition, and on the 25th of June, 1896, the court rendered a decree on the petition (Record, pages 24, 25), in which is the following:

"It is ordered, adjudged and decreed that said sale be, and the same is, hereby confirmed in all respects, and the said Samuel C. Dunlap, as such commissioner, be and he is hereby authorized and directed to convey to *said purchasers named*, all and singular the property and the property rights of every description described in said decree, *upon the purchaser complying with the terms of said sale.* * * * And the court retains and reserves the right to seize and order a sale of said property for the purpose of satisfying any such *balance* so found to be due as hereinbefore set out, and the title shall be made by said commissioner to the purchaser *subject to this provision.*"

10. This *balance* relates to a demand for rents claimed by the Huguley Manufacturing Company from the Galeton Cotton Mills. This supposed balance was disposed of in the decree of the court, rendered October 15, 1898 (Record, pages 72–74), and there was ordered to be made to the purchaser, *L. Lanier*, or to "such person as *he* may designate, a deed to the property sold, and the purchaser shall thereupon be vested with a good and clear title to said property, as of the date of sale, and with the same effect in all respects as to all persons whatsoever, as if said sale had been completed and the property conveyed to him upon the date thereof, May 5, 1896."

This decree cleared off the only qualification in the decree of June 25, 1896, that could in any event affect the title to the property sold on the first Tuesday in May, 1896. That sale was made under the decree of March 30, 1895, which had been affirmed in the circuit court of appeals, on which judgment the mandate of the appellate court issued on the 25th of February, 1895, and on the 10th of March, 1896, the circuit court "ordered that the mandate from said circuit court of appeals be entered on the minutes of this court in said cause stated, and that in accordance with the judgment of the court of appeals the said final decree of this court stand affirmed."

11. This solemnization of the previous proceedings in the cause connected this second sale of the property and its purchase by the Galeton Cotton Mills, with the sale on the 6th of September, 1892, under a decree that was reversed, and it was intended to legalize that sale, and for that reason it was so arranged in the decree of March 30, 1895, that no one

would or could purchase the property except the bondholders represented by L. Lanier, who comprised the Galeton Cotton Mills Company.

12. In his opinion and decree of 11th of April, 1898, Judge Newman says:

"A decree was rendered foreclosing the mortgage, in the circuit court, which was reversed in the circuit court of appeals, not because of any error in the decision of the circuit court that complainant was entitled to foreclosure, but on the ground that there had been no accounting as to the bonds on which the interest had been paid, and those on which the interest had not been paid." "In the meantime and pending the appeal, the property had been sold and had been bought in for the bondholders by a committee representing their interests."

This conspicuous error in the statement that *all* the bondholders were represented by a committee in making that purchase, is contradicted by the decree of March 30, 1895; yet it is repeated in the decree of April 11, 1898, as follows:

"Motion is now made by the purchasers who, as stated, are the *bondholders*, to set off the amount found for rents and profits during the time of their possession between the two sales against the amount of the deficiency decree. This is resisted by the Huguley Manufacturing Company. It is claiming the rents and profits, and that is the question now presented for determination" (Record, page 56).

13. This statement of the court is an error of fact that is contradicted by the entire record relating to the sales of the property under the decrees of the circuit court. Judge

Shelby, in delivering the opinion of the court of appeals in this case, fell into the same error of fact and adopted it.

14. Judge Shelby also decided in that opinion and judgment of affirmance that "on January 1, 1894, the Alabama and Georgia Manufacturing Company executed a mortgage or deed of trust to J. J. Robinson and two others to secure $65,000 of bonds issued by it that day.

"Subsequently the property embraced in the mortgage was sold under a decree of a State court subject to the mortgage.

"Under this sale the Huguley Manufacturing Company became the purchaser and owner of the property, subject to the incumbrance of the mortgage, for $65,000. It was placed in possession of the property."

This ascertainment of the rights of the Huguley Manufacturing Company and the lawfulness of their possession of the property sufficiently settles those points for the purposes of this motion.

15. After the affirmance of the decree of March 30, 1895, the question of the sale of the property and the compliance with the terms and conditions of the sale as prescribed in that decree concerned *all* of the bondholders, as well those who were therein provided for as those that were excluded.

16. The exceptions taken to the master's report in this case (Mr. Felder) show that it was grossly erroneous in favor of the Galeton Cotton Mills as to the amount of rents and profits received by that company during its possession of three years and eight months. Yet he found that, after many strained allowances, they were indebted to the Galeton Cotton Mills in the sum of $39,713.51, of which sum $3,391.04

was for property converted September 6, 1892, and interest thereon.

Even assuming the basis of the master's award, a property that brought a net income of $10,000 a year was a good security for a mortgage debt of $65,000, and all the bondholders had the right to expect full payment of their bonds and interest from its proceeds.

17. After the decree of March 30, 1895, the controversy was between the Galeton Cotton Mills and the Huguley Manufacturing Company as to the rents and profits of the property, and between both those companies and the bondholders as to the application of the rents and profits to the mortgage debt.

On this controversy, the Galeton Cotton Mills, which is a syndicate of certain bondholders, represented those of the bondholders that owned that company, and the other bondholders were not represented.

18. The assignments of error touching this triangular, or quadrangular, contest, on pages 79 to 95 of the record now before the court and on pages 62 to 64 of the more complete record now submitted to the court by appellants, relate chiefly to controversies arising out of the sales of this mortgaged estate and the rents and profits thereof, and it is essential to a proper understanding of this case that the principal features of those proceedings should be separately stated. When the record is completed, the appellants will ask leave of the court to make additional assignments of errors.

VIII.

Proceedings under the Decree of March 30, 1895, as shown by the Record now before the Supreme Court.

1. Without stating the proceedings on the motion of the Huguley Manufacturing Company to be reinstated in the possession of the mortgaged property, which antedate the decree of March 30, 1895, it appears that on the 10th of March, 1896, the Alabama and Georgia Manufacturing Company and the Huguley Manufacturing Company moved the court for a reference to a master to take an account of the rents and profits of the mortgaged property in the possession of a part of the bondholders, and pointed out the bondholders who were and those who were not members of the Galeton Cotton Mills Company. On the 16th of March, 1896, the court made an order of reference for that purpose to Thomas B. Felder.

2. On May 1, 1896, the defendants in the cause filed a petition asking the postponement of the sale of the property for at least sixty days until the special master, Felder, could have time to ascertain the amount due from those of the bondholders who are in possession of the mortgaged property.

The petition represented that the property was about to be sacrificed by the sale.

On May 2 the petition was refused (Record, page 19).

On the 7th of May, 1896, Samuel C. Dunlap reported the sale of the property and its purchase by L. Lanier, *representing a majority of the bondholders of said defendant company.*

On the 27th of May, 1897, L. Lanier petitioned the court for the confirmation of the sale of the property, stating "that your petitioner, *for and on behalf of the holders of the bonds* of the Alabama and Georgia Manufacturing Company, bid off said property at and for the sum of $66,000.00; that he paid into the hands of said commissioner on the spot the sum of $5,000.00, as in said decree provided for; petitioner is ready to surrender the bonds of said company in payment of the balance of the purchase-money on confirmation of the sale, all of said bonds being legally or equitably the property of your petitioner and his associates and under their control."

3. This petition was contested by the defendants in the suit and was granted by the court June 25, 1896 (Record pages 21 to 25).

Thomas B. Felder, special master, filed his report on the 9th of October, 1897, under the decree of the court rendered 16th of March, 1896, as to rents and profits, damages, &c., in which he awarded to the "movant" against The Galeton Cotton Mills $39,713.51.

The Galeton Cotton Mills and J. J. Robinson filed exceptions to that report on certain grounds, and the Huguley Manufacturing Company filed separate exceptions on other grounds.

4. The court decided these exceptions in a decree rendered 23d of February, 1898 (Record, pages 46 to 53).

5. In the decrees that follow (on pages 55 to 66 of the Record), dated April 11, 1898, and April 26, 1898 (Record, page 63), and June 4, 1898 (Record, pages 64 to 67), the court

makes further disposition of the $39,713.51, above mentioned, as follows:

(*a.*) In the decree of February 23, 1898, the court reduces the amount of rents and profits charged against the Galeton Cotton Mills ($39,713.51) by the allowance to them of the sum of $3,502.52 for insurance premiums paid on the mortgaged property and on the cotton used and the stuff manufactured by them while they were in possession of the property, thereby reducing the sum due for rents and profits to $35,857.54.

(*b.*) In the decree of April 11, 1898, the court refused to decree this balance to the Huguley Manufacturing Company as rents and profits due to them. As to the application of this sum to the mortgage debt the court said:

"It seems to me beyond question that the purchasers were entitled to have this amount applied to the balance of their debt."

(*c.*) "Their debt" was "the deficiency" decree for which execution was awarded in the thirteenth paragraph of the decree of the 30th of March, 1895.

6. By this decree the sum of $35,857.54 was swept into the pockets of the bondholders who owned the Galeton Cotton Mills Company, and who are the same who are provided for by a special decree of foreclosure in paragraph 5 of the decree of March 30, 1895, and by especial privileges as bidders at the sale of the property in paragraphs 9 and 10 of said decree.

7. Until the case had progressed to the point of applying the rents and profits of the property to the benefit of this syndicate or combination, the real purpose and effect of that decree did not appear.

It was to give the Galeton Cotton Mills a preference over all other bondholders in the decree of foreclosure and in a money decree, with execution for the amount of the bonds held by them, with interest at 8 per cent. from March 30, 1895, thereby compounding the interest, and a privilege over all others in the terms of purchasing the property, of which they availed themselves, and also a decree that forced the sale *before* the master could take an account of the rents and profits of the mortgaged property in the possession of the purchaser, the Galeton Cotton Mills, alias the bond syndicate, and a confirmation of that sale on the 25th of June, 1896, *before* the master made or could make his report.

8. They thus got the title to the property, *freed from every incumbrance* and with the equity of redemption barred, on the false statement in the petition of L. Lanier, of May 27, 1896, that "petitioner is ready to surrender the bonds of said company in payment of the balance of the purchase-money on confirmation of the sale, all of the bonds being legally or equitably the property of your petitioner and his associates and under their control" (Record, page 20).

9. The falsity of this statement is shown by the fact that after the confirmation of the sale the bonds were not produced in court and to this day have not been proven or

surrendered or canceled. There is not even a copy of a bond in the entire record. That these statements were false is further shown by the recitals in the decree of the court on October 15, 1898, as follows:

"*And it appearing that owing to the delay in the determination of the questions submitted to the special master, it has been impracticable to pay for said property in bonds of the Alabama and Georgia Manufacturing Company, as provided in the decree of foreclosure,* AND WHEREAS THE SAID HUGULEY MANUFACTURING COMPANY HAS GIVEN NOTICE OF AN INTENDED APPEAL OF SAID CAUSE TO THE CIRCUIT COURT OF APPEALS, WHICH WILL RENDER IT IMPRACTICABLE UNDER SUCH NOTICE TO ASCERTAIN DEFINITELY TO WHAT EXTENT THE BONDS OF THE ALABAMA AND GEORGIA MANUFACTURING COMPANY COULD BE USED FOR THE PURPOSE OF PAYING THE PURCHASE-MONEY AS PROVIDED IN SAID ORIGINAL DECREE, AND THIS COURT BEING OF THE OPINION THAT IT IS FOR THE BEST INTERESTS OF ALL THAT THE PROPERTY SHOULD BE SETTLED FOR BY THE PURCHASER AND A FULL AND COMPLETE TITLE BE MADE BY THE COMMISSIONER TO SAID PURCHASER, OR TO SUCH PERSON AS HE MAY DIRECT, FREE FROM ALL LIENS, CLAIMS AND DEMANDS IN FAVOR OF ANY PERSON OR CORPORATION, PARTY TO THIS RECORD.

"And it further appearing that the said Huguley Manufacturing Company has failed to obtain any decree in the cause which could be operative as against the property under said decree of confirmation, it is therefore ordered that the decree of confirmation *be modified with respect to the provisions fixing a lien on the property in favor of the Huguley Manufacturing Company* as to any amount it might ultimately be decreed to be entitled to, and that the before-recited provisions of *said decree of confirmation be* set aside, and whatever rights the said Huguley Manufacturing Company may hereafter have, or may hereafter be adjudged to have, *be transferred to the net proceeds of the sale of the prop-*

erty, to be paid into the registry of this court as hereinafter specified."

10. The decree of confirmation mentioned and "modified" was rendered on the 25th of June, 1896, before the special master, Felder, had made his report in this case awarding to the Huguley Manufacturing Company $2,500 (Record, page 25), and it was followed up and made a lien on the property, after exceptions to its allowance were overruled in the decree of the court of June 4, 1898, paragraph 6 (Record, page 66), as follows:

"It is further decreed that the sum recovered by the Huguley Manufacturing Company, to wit, $2,500.00, principal, and $89.04, interest, *the same being for supplies and findings* is hereby taxed with the sum of $750.00, the same being the proper share of the costs taxable against the said Huguley Manufacturing Company as against the special finding in its favor for the balance of said special finding, after deducting the said sum of $750.00, *the same to be a lien on the mortgaged property* in the hands of the purchaser."

So that this lien still exists under that decree, notwithstanding the modification of the decree of confirmation mentioned in the decree of October 15, 1898. This item in Felder's report was for property converted by the Galeton Cotton Mills that was not included in the mortgage.

11. The excuse for the violation of the decree of March 30, 1895, which was affirmed by the circuit court of appeals and was beyond the power of the circuit court to modify or change or to lawfully disregard it, and for the total departure from its provisions in the proceedings to sell the property, and the requirement of a cash payment for the property,

instead of a payment in bonds, is a painful illustration of the uncertainty of judicial proceedings in some cases and of the disloyalty of some inferior courts to the rulings and mandates of the superior courts.

12. The property sold for $66,000 as of the date of May 5, 1896. Add to this the sum of $35,857.54, the amount awarded to the complainant against the Galeton Cotton Mills for the rents, profits, and interest, and the yield of the entire estate is $101,857.

Of this sum there was paid into court on the first sale	$10,000
On the second sale	4,898
	$14,898

And this is all the money that was paid into court.

The haste in distributing this money to costs, lawyers' fees, and bondholders who were dangerously importunate does not seem becoming to sedate justice.

13. By the decree of June 4, 1898, the sum of $65,753.03, net, was applied to the bond indebtedness.

The costs, expenses, and attorneys' fees allowed by the court in that decree were as follows:

Costs in the case, balance	$182.00
Fees of Felder, special master	2,500.00
Fees of Julius L. Brown, special master	375.00
Fees of A. E. Buck, special commissioner	400.00
To A. S. Waldo	200.00
To J. J. Robinson, trustee	500.00

To D. O. Smith, stenographer	$875.00
Costs of advertising and commissions	372.00
Court costs	230.00
Award to Huguley Manufacturing Co	1,750.00

Fees to Attorneys.

Dorsey, Brewster & Howell	1,000.00
Dorsey, Brewster & Howell	3,500.00
B. F. Abbott	3,500.00
Abbott & Smith	1,000.00
To N. D. Denson	600.00
To B. F. Abbott, paid by Dunlap	2,000.00
	$18,544.00
Amount applied to debt	65,753.03
	$84,297.03

14. *At least 90 per cent. of these costs and fees were occasioned by the resistance of the Galeton Cotton Mills to the payment of rents and profits and to their effort to capture the title to the property under forced sales with great advantages to them in the biddings.*

15. In the decree of June 4, 1898, from which the foregoing items are taken, is the following: "3. It being made to appear that the mortgage indebtedness at the date of the sale" (by Dunlap) "was the sum of sixty-five thousand dollars principal, and thirty thousand seven hundred and $\frac{1}{100}$ dollars interest, the said sum of sixty-five thousand seven hundred and fifty-three and $\frac{3}{100}$ dollars is hereby applied to said indebtedness as follows," setting forth the items.

16. This application of purchase-money to the indebtedness of the Alabama and Georgia Manufacturing Company canceled that amount of bonds in the hands of Lanier and his associates, if he held them, *but he did not hold or own them*, as is shown by the subsequent decree of October 15, 1898 (Record, page 73).

17. The date of the sale of the property, when the title passed to the purchaser, is in law and justice the proper date for the settlement of the rights of the bondholders and the mortgagor, and the date of the sale and the conveyance of the property relate to the 5th day of May, 1896, by the decree of 15th of October, 1898 (Record, page 72), which was rendered 2 years 5 months and 10 days after the sale was made. *This delay had the effect to give the rental for that period to the Galeton Cotton Mills.*

18. The special master, Felder, charged against the Galeton Cotton Mills the rents and profits to April 30, 1896, five days before the property was sold to them. The balance against that incorporated syndicate of bondholders was $39,713.51, on which he computed interest at 7 per cent. to October 7, 1897, the date of his report. In the meantime the debt of the mortgagor, on which interest was compounded in the decree of foreclosure, March 30, 1895, was bearing interest at 8 per cent. after it had once been compounded.

19. In the decree of the court, upon exceptions to Felder's report, February 23, 1898, the above-stated balance was reduced to $35,857.54 (Record, page 53). In the decree of April 11, 1898 (Record, page 56), this balance is again stated as being $35,857.53.

20. The Huguley Manufacturing Company claimed that balance, and their petition was refused in that decree.

21. Then the Huguley Manufacturing Company moved the court to apply these rents and profits as credits on the bonded debt held by the Galeton Cotton Mills, at a date intermediate between the first and second sales, and the court refused the motion on the 26th of April, 1898 (Record, page 63).

22. Then, on motion of Robinson, trustee, and the Galeton Cotton Mills, the court proceeded, on June 4, 1898, "to apply the net proceeds of amount of rents, issues and profits to the mortgage debt," which was done as follows:

The amount, net, of the sale by Dunlap was stated to be	$65,753.03
The debt of the mortgagor is stated at $65,000 principal and $30,712.01 interest	95,712.01

The interest was to be first paid, amounting to $30,712.01, and that payment was to date on April 6, 1896.

23. This was an error of $10,087.18. The debt, as it is stated in the decree of March 30, 1895, with the interest then due upon it, was as follows:

Debt then matured	$45,000.00
Interest to date of decree	17,005.92
Debt not then matured	20,000.00
Interest to date of decree	3,451.24
	$85,457.16

The interest on this entire sum, with interest computed on interest allowed in the decree of March 30, 1895, being three years and sixty-four days, at 8 per cent., is $20,624.83.

24. In the decree of February 28, 1898, the sum due to the Huguley Manufacturing Company for findings, &c., was allowed (Record, page 54) for $3,391.04, including interest at 7 per cent. to October 9, 1897, average date, and a decree was rendered against the Galeton Cotton Mills for $35,857.54 after deducting that sum, and in the decree of April 11, 1898 (Record, page 60), this sum was applied to the mortgage debt and interest.

25. In the decree of June 4, 1898 (Record, page 64), the sum of $3,391.04 decreed to the Huguley Manufacturing Company is again deducted from the sum so decreed against the Galeton Cotton Mills, viz., $35,857.54, leaving the balance due from said Galeton Cotton Mills $32,466.50 for principal and interest to 9th of October, 1897, thus changing entirely the former decrees without correcting or overruling them and without the statement of any reason for such change in the rights and obligations of the parties.

26. A very unintelligible account is stated by Felder, special master, on page 37 of the record, but he fixed the point of settlement at April 30, 1896, which was four days before the sale of the property, considering that as the date at which the law would require settlement to be made. He therefore charged the Galeton Cotton Mills with rents and profits up to April 30, 1896—three years and eight months—a sum that the court reduced to $35,857.54, show-

ing a net profit of over $8,000 per annum, and that the property was worth at least twice the amount of the mortgage debt.

27. From April 30, 1896, to the decree of the application of the proceeds of the property to the mortgage debt, on June 4, 1898, no rent, income, or profits of the mortgaged property have been accounted for, nor have such rents, profits, or income since been accounted for, but the balance found due by the master, as of April 30, 1896, has stood as the only sum for which the Galeton Cotton Mills are liable, and that has been reduced by the court from time to time until it has fallen from $35,857, in February, 1898, to $32,446.50, on June 4, 1898.

28. During all that time the Galeton Cotton Mills have held possession of property worth, upon said basis, a net profit of more than $8,000 per annum, for which they held no title until the 15th of October, 1899.

From the 30th of April, 1896, until the 15th of October, 1898, a period of two years and six months, they have held possession of the property, which must have been worth, in same proportion, net profits, $20,000, with no other accountability than the payment of interest at 7 per cent. on a debt they owed the plaintiffs, amounting now to $32,446.50.

29. Thus the case proceeded, against objection, and the interest at 8 per cent. on the bonds, compounded March 30, 1895, and again the 30th of April, 1896, against the interest on $32,446.50, at 7 per cent., to represent the rents of property that yielded, net, more than the interest at 8 per cent on $100,000.

30. At that rate the interest on the bonds held by th syndicate would soon extinguish the debt they owed for th income and profits of the property, up to April 3, 1896; bu they had acquired possession of the property, and it wa greatly to their interest that they should postpone the set tlement so long as they were paying no rental for it.

31. On the motion of the Galeton Cotton Mills the appli cation of the purchase-money to the bonds was postponec (Record, page 25).

32. This demand for delay was, manifestly, in conse quence of a fraud upon the court, practised by L. Lanie when he stated to the court, on the 27th of May, 189 (Record, page 20), that—

"Petitioner is ready to surrender the bonds of said com pany in payment of the balance of the purchase-money, or confirmation of the sale, all of said bonds being legally or equitably the property of your petitioner and his associates and under their control."

In paragraph 7 of the decree of June 4, 1898, more than two years after this false representation was made, on mo tion of the Galeton Cotton Mills—

"It is further decreed that if any of the bondholders should elect not to join in the purchase of the property, such bond holder shall be entitled to receive the percentage to which said bonds shall be entitled on distribution, subject, of course, to any payments that may have been made on the same on former sale of the property and subject to all proper taxation for costs and fees and other proper adjustment according to the scope of this decree. And the purchaser shall pay into court sufficient money to settle with the bondholders who

do not join in the purchase if any such shall be necessary" (Record, pages 66 and 67).

33. No predicate of fact or even of suggestion is found in the record for this part of the decree. Why it should have been made can only be conjectured, except for what is stated in paragraph 10 of the decree, as follows:

"*It is also represented that $65,000.00 of bonds of the Galeton Cotton Mills were issued for the purpose of taking the place of a similar amount of bonds of the Alabama and Georgia Manufacturing Company, and that the purchasers of the property either paid the interest on the bonds or procured it to be paid for several years. The right of the purchaser or such other person to be reimbursed out of the proceeds of said property before any distribution is made is reserved for future decree.*"

34. The eighth paragraph of the decree of June 4, 1898, shows that these bonds of the Alabama and Georgia Manufacturing Company had been the subject of traffic, and that the ownership of them changed, *lis pendens*, and that the money paid upon the purchase of the mortgaged property did not belong to the Galeton Cotton Millls, "and the original holders of said bonds are not entitled to receive any percentage on said bonds, until after the amount so advanced is repaid to the person advancing it."

35. These family troubles lingered, and delayed "the course of justice" until L. Lanier was compelled to seek the mercy of the court to free him from the decree he had obtained on the 25th of June, 1896, confirming the sale of the property and declaring "that the provisions and directions of said decree (of sale) were in all respects complied with."

36. To get this indulgence he petitioned the court to decree *him* an absolute title to the property, the deed to be made to him "as trustee, or to such person or persons as he may direct," "on your petitioner complying with the decree in said case *by paying into the court enough money as may be necessary to pay all expenses, fees, costs, and such bondholders as may decline to turn in their bonds as payment on the purchase, and require payment of what is allotted to each.*"

37. In this petition he starts out with a false statement in saying as follows:

"And at said sale your petitioner represented such of the bondholders as were living to join in said purchase at said sale." He stated in that petition that he represented all of the bondholders and did not say or suggest that any of them were dead. He then proceeds to say:

"Your petitioner further shows that *quite a number* of the bondholders are now unwilling to join in the purchase of said property, but are insisting on taking their per cent. of the proceeds going to the bondholders in cash and are unwilling to furnish the necessary cash to comply with said decree, and your petitioner will therefore be compelled to raise the money to pay expenses, costs, fees, and those bondholders who require cash in the distribution."

38. The decree on this petition (Record, pages 72–74) either substitutes L. Lanier as the purchaser of the property in his *personal* right, thereby changing the whole character and purpose of the sale, or it enables the Galeton Cotton Mills to acquire the property without having paid into court the sum of $32,000 decreed against it on the 4th day of June, 1898, and in both cases making the title relate back to the 6th day

of May, 1896, thereby giving to that company the rentals and profits from that date until the 15th of October, 1898.

39. In the decree of June 4, 1898, the mortgage debt is found by the court to be $65,000 principal and $30,712.01 interest—total, $95,712.01—to which is applied $65,000 of bonds and $32,466.50 due from the Galeton Cotton Mills—$97,466.50—and the balance is applied to costs and fees of counsel, leaving a large deficiency, of which more than $5,000 is charged to the bondholders. It transfers to the fund in court, when the $48,433.36, the balance of the purchase-money is paid, the debt due from the Galeton Cotton Mills to the Huguley Manufacturing Company, for about $1,700, after taxing it with $891.04 costs, which debt had been made a lien on the property.

The decree of March 30, 1895, is utterly lost in this contradiction and confusion of decrees.

IX.

1. The fatal error of proceeding in this cause without the indispensable parties, the bondholders, whom Robinson, the trustee, did *not* represent, and who refused to follow him in the scheme of placing the title to this property in the Galeton Cotton Mills syndicate, has produced much of the embarrassment, loss, and vast expense of this litigation.

2. If Huguley or the Huguley Manufacturing Company, whose officers were the same with the Alabama and Georgia Manufacturing Company, were interested adversely to the bondholders, and the Galeton Cotton Mills represented those bondholders who got the decree of foreclosure on the

30th of March, 1895, it was impossible in a court of chancery to proceed with the case until they were made parties to the suit.

3. The result has been that while no one disputed the right of all the bondholders to the satisfaction of their debts out of the mortgaged property, and the trustees in the deed had the power of sale, and it was their duty to sell the property on the demand of any bondholder, in case of default, they have been drawn into a litigation that has already continued for ten years, and are taxed enormously with costs and lawyers' fees, and have now no other rights secured to them than the right to litigate for a share of the $48,433.36, which the court, in its decree of October 15, 1898 (Record, page 73), has ordered to be paid into the registry of the court.

4. They were deprived of an investment of their money at 8 per cent. that was perfectly secured and on which the interest was duly paid them, and forced to crowd a faithful debtor to ruin, in order to put it in the power of Lanier and those who joined him to force the sale of a splendid property that was earning good dividends and was kept in a good state of repair. They refused to do this, and when Lanier came to the end of his program he found himself deserted by other bondholders, who refused to unite in paying for the property he had bought by giving him control of their bonds. His own consorts required cash for the bonds at the end of the campaign, and in order to get it he had to ask the court to reverse its own decrees and the decree of the circuit court of appeals, and to turn over the property

by deed to *his* appointee, to use it as he might choose in getting the money to pay them.

5. As none of the bondholders are parties to the suit and many repudiate Lanier's trusteeship, the court had no power to control them except by judicial pressure, of which there is a startling example in the seventh and eighth paragraphs of the decree of June 4, 1898 (Record, page 66), and in the entire decree of October 15, 1898.

X.

Argument of the Points of Law Touching the Certiorari, the Appeal, and the Power of the Court to Review the Entire Proceedings in this Case, and the Assignment of Errors on the Record.

1. The foregoing statement of the history of this case, as it is shown by the recitals of facts in the opinions of the judges of the circuit court and of the circuit court of appeals, and by a part of the other records in this case, applies to the motion for certiorari and the other motions submitted in this cause, and also the appeal in this cause, and to any further order or decree that this honorable court may make in the case.

2. The writ of certiorari is the most comprehensive of the processes by which appellate courts take cognizance of the records of inferior courts in cases that involve appellate jurisdiction and the powers of supervision and correction.

It is the writ of the court, and can only be issued by order of the superior jurisdiction.

A party to a suit asking a writ of certiorari to complete or correct a record sent to the Supreme Court must satisfy the court, by affidavit or other proofs, that the application is well founded, and that it is not made for delay.

If it is well founded and has not been purposely delayed, it should be granted, even if greater diligence might have sooner brought the defect in the record to the attention of the court; and this seems to be a proper construction of rule 14.

3. In this case the difficulty had its origin in defects in the record of the circuit court of appeals, which show contradictions in the minutes of the circuit court of appeals between the docket numbers of the case, as stated by the circuit court of appeals in the caption of its opinion and decree, and the judgment entry on the minutes. Which number is correct is not within the knowledge of the appellants; but, whichever of the numbers may be correct, the other must be corrected by the court in whose record the error exists, for the reason that the identity between the respective records is not capable of being proven by the correspondence of the titles of the causes, which is not substantially exact, and there is no other fact in the record by which the correct number or title of the cause can be established.

It is therefore submitted that until a complete record is certified to the Supreme Court it cannot be decided whether the necessary correction can be made by the Supreme Court or must be made by the circuit court of appeals.

4. The record certified to the Supreme Court by the clerk of the circuit court of appeals on the 15th of May, 1900, upon its face shows that it is incomplete.

Many parts of that record, and especially the matters stated and the facts found in the opinions of the circuit court and in the opinion of the circuit court of appeals, show that only a part of the record in the case is in the transcript filed June 25, 1900.

5. The appellants produce and submit to the court a transcript from the records of the circuit court of appeals, certified by the clerk of said court on the 6th day of October, 1899, which they insist is a record of the proceedings of the circuit court for the northern district of Georgia in the cause in which this appeal is taken, and that it presents the record of said circuit court on which said appeal was heard in the circuit court of appeals for the fifth circuit, on the 17th, 18th, and 19th days of May, 1899.

6. No record is found in either of these transcripts of a certificate of the clerk of the circuit court of the northern district of Georgia, which identifies the record of the case, and the circuit court of appeals has not caused any statement to be made of the papers or proofs on which this case was heard in the circuit court of appeals.

7. This uncertainty has resulted apparently from the failure of the circuit court of appeals to require the identification of the papers in two former appeals in this case in said court, which papers were referred to on the hearing of the appeal taken by appellants and allowed by Newman, circuit judge, on the 2d of December, 1898, under an agreement of counsel that "either party, on the hearing of this appeal, may be at liberty to refer to any such parts of the

record of said former appeals, or either of them, as they may see proper."

8. If the judgment of the circuit court of appeals is held to be a valid judicial act upon the record as it is now certified to the Supreme Court, and if the writ of certiorari to complete the record is denied, the appellants respectfully insist that the incomplete state of the record does not affect the validity of the appeal, since if it is a valid judgment or decree, errors can be assigned upon the record that supports it, and the Supreme Court has jurisdiction to consider the same. If it is invalid, that declaration reverses and annuls it.

XI.

On this record, as now presented to this court, the appellants insist as follows:

1. That all the proceedings in the circuit court set forth in the record are open to the judicial power of the Supreme Court to correct the same where they are in error, without reference to the date of any decree or any order to which exception was duly taken, and that the affirmance or the reversal by the circuit court of appeals of any order or decree of the circuit court of the northern district of Georgia in this case is open to correction by the Supreme Court; and that the jurisdiction of the Supreme Court reaches to the entire case from the beginning, and errors may be properly assigned upon any part of the record, unless the same have been waived.

2. That it appears from the record in this case that there is no equity in a decree, or in a bill on which a decree can be based, that asserts the judicial authority to decree the foreclosure of the mortgage described in the decree of the 30th of March, 1895, in favor of the trustee therein, for the benefit of the holders of 90 bonds out of 130 secured by the mortgage, and that also refuses the benefits of such foreclosure and of a recovery upon the other 40 bonds, in the manner stated in said decree.

3. That it appears from said decree that the bondholders against whom it makes such radical discriminations, are necessary parties to the suit, and that no valid judgment or decree can be made in the case in their absence as parties to the suit.

4. That it appears from said decree that the larger part of the property directed to be sold under it, and that was sold under it, is situate within the limits of the State of *Alabama* and is not within the limits of the jurisdiction of the circuit court of the northern district of Georgia, and that the decree is erroneous for the want of jurisdiction in said court to render the same.

5. That in the proceedings subsequent to said decree and based upon it, after it was affirmed in the circuit court of appeals, the circuit court violated and disregarded the mandate of said court in the sale of the property and in the distribution of the proceeds of such sale, and in its decrees touching the rents and profits of said property.

6. The foregoing questions relate to the exercise of the jurisdiction of the court and its conduct of a case in its progress, which are matters that concern the due, proper, and lawful administration of justice, that are within the power of the supreme appellate court for the conservation of public justice, and are matters that the parties to a suit cannot waive or regulate by agreement, or by their laches.

XII.

1. This case is before the Supreme Court on appeal allowed by a judge of the circuit court of appeals for the fifth circuit. This appeal transfers the case to the Supreme Court for hearing, and, although ground for dismissing the appeal may exist, such a fact, if it is a fact, does not deprive the court of the power to enter a judgment in the case, affirming or reversing the decree of the inferior courts. Such a judgment would not be void—if any judgment of the Supreme Court can be void—as between the parties to the record.

The appeal, then, gives the court jurisdiction of the case under the Constitution and in conformity with the statute.

2. To determine whether this court will retain the appeal and exercise its constitutional appellate power in the case, the act of March 3, 1891, must be construed, to ascertain whether it creates an exception to the appellate jurisdiction of the court within which this cause comes, and thereby excludes it from the appellate power and the supreme judicial power of the United States which is vested in the Supreme Court by the Constitution.

3. After having exercised this jurisdiction and power from the organization of the Government, in cases "between citizens of different States," an effort of Congress to take this power and jurisdiction from the Supreme Court and confer it upon an inferior court could hardly be justified under paragraph 2 of section 2 of article III of the Constitution, which does not touch the power of the Supreme Court, but empowers Congress, possibly, to except certain cases from its appellate jurisdiction.

4. The Supreme Court is a co-ordinate department of the Government, and the powers vested in it by the Constitution are beyond the control of any other department. Its jurisdiction, when extended to cases between parties to suits that are begun in courts of inferior jurisdiction, is limited to controversies between citizens of different States, and to other people, States, and questions specified in the Constitution; and it can enter judgments that bind such parties: but Congress cannot destroy this power by creating exceptions as to the right of appeal, or by regulations to control it. Such exceptions and regulations relate to the parties to controversies, not to the powers of the court as the supreme judicial tribunal of the United States, which is certainly equal to any supreme judicial court in the world, and has all the judicial powers that inhere in all supreme courts of justice. Can Congress destroy the appellate powers of the Supreme Court by declaring that all judgments of inferior courts are final?

5. In enacting the law of March 3, 1891, Congress was extremely cautious and careful not to trench upon the

powers and jurisdiction vested in the Supreme Court by the Constitution, and manifested especial care in respecting the judicial supremacy of the court over inferior courts of the United States and in preserving all its authority over State and territorial courts.

It enacted that—

"The judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the parties to the suit or controversy, being aliens and citizens of the United States or citizens of different States" * * * "excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision."

This may cut off the right of a party to a suit to invoke the judgment of the Supreme Court upon the rulings in such a case by the circuit court of appeals.

6. But does it take away the power of the Supreme Court to supervise the action of the circuit court of appeals, because it has failed or refused to certify a question to the Supreme Court for decision? The answer to this question is found in the following paragraph of the act, where a very broad exception to the finality of a decree of the circuit court of appeals is provided:

"And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, *by certiorari or otherwise*, any such case to be certified to the Supreme Court for its review and determination with the same power and

authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

This preserves the full appellate power of review and determination, under the Constitution, and gives the court plenary and discretionary power as to the manner in which it will exercise this power, or the writ or mandate it will issue to the inferior court, whether "by certiorari or otherwise."

7. This is not a right secured to a party to a suit, to appeal upon points reserved, but it is something very much higher. It is the right to petition the Supreme Court of the United States to "review"—again to examine—the record of a cause in the circuit court of appeals and determine the same according to law and justice and the right of the matter; and this statute defines the power thus resorted to as being "the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." Without this power of "review" by the Supreme Court, uniformity of decision, obedience to the law as it is settled by the Supreme Court, and correctness of procedure would be in the discretion of inferior courts.

8. Of course the Supreme Court can reject such a petition, but it will never do so if such rejection is a denial of justice. It may say, as a general rule, that it will exercise such jurisdiction only in cases of public importance or as to questions of general concern. No exact definition can be given to the limits of such a rule.

"The equal protection of the laws," which cannot be denied "to any person," is the truest guide to the conscience

of the court and the only safe reliance of the people in the exercise of such discretionary powers.

This is especially true where the powers and jurisdiction of an inferior court have been abused, or corruptly used by any party to a suit, or where such a court has usurped jurisdiction in a case, or has determined the rights of persons who are not parties to the suit, or has violated or disregarded the mandate of a superior court, or has exceeded its jurisdiction in rendering a decree in a cause, or has decided upon the rights of the parties in matters that are not within the issues formed in the pleadings in a cause, or has unjustly and unlawfully imposed the payment of sums of money upon a party to a suit, that are onerous, as a condition precedent to his being admitted to a clear legal right.

9. In cases of the kind mentioned, of which this case is an illustration, the action of the Supreme Court is appellate and supervisory, but it is moved to such action upon an application made to it directly or upon a record which a judge, duly authorized by law, has caused to be sent up to the Supreme Court on an appeal. The record being filed under the provisions of law, the jurisdiction attaches.

In either case, or in any case, the Supreme Court, under rules provided by its order, will take cognizance of the case, without being prevented by the form or manner in which the injustice complained of is presented for consideration.

10. That this full exertion of the power to do justice and to require it to be done by inferior tribunals is in keeping with the spirit and purpose of the statute is exemplified in the following paragraph:

"The circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions certified to it, which shall be binding on the circuit court of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal."

11. If an appeal, lawfully granted and prosecuted, brings a record from an inferior court to the Supreme Court, the court has power to take cognizance of the case and may render its decree upon the entire record. This is an original power of the court, as to which the statute is only declaratory, or in affirmation of existing law.

XIII.

But this appeal is sustained by the statute, on other grounds, as a valid appeal in this case.

1. This jurisdiction of the circuit court in this case is not "dependent entirely upon the citizenship or the residence of the opposing parties to the suit."

In a case in equity, the citizenship of the parties is never the sole test of the jurisdiction of a court. The jurisdiction of a Federal court of equity depends also upon the nature of the cause of complaint or the facts stated. There must first be jurisdiction of the court to hear and determine the rights of the complainant as they are stated in a cause in equity,

and then jurisdiction of the parties, which depends on citizenship.

The facts upon which the jurisdiction of the cause depends must be stated in the bill of complaint in a cause in equity, and if they do not show the jurisdiction of the court, and also of the parties, the court cannot render a lawful decree in the cause. In such a case the jurisdiction of the court cannot "depend entirely" upon the citizenship or residence of "the opposite parties to the suit or controversy."

2. As this part of this law is in derogation of the appellate jurisdiction and power of the Supreme Court, it must be construed strictly and must be limited to the cases that are clearly excepted from the operation of the constitutional powers and jurisdiction of the Supreme Court by act of Congress.

3. The words "final in all cases," used in this part of the statute, are not necessarily exclusive of the appellate jurisdiction of the Supreme Court, nor do they make that jurisdiction to depend upon the consent of the circuit courts of appeal, signified in certifying questions in the case to the Supreme Court for its decision. No case can be stated in which the jurisdiction of the Supreme Court can be made to depend, under the Constitution, upon the consent of the inferior courts.

4. This statute may affect the rights of the parties to a suit to transfer the cause by appeal or writ of error into the Supreme Court, but it cannot and does not affect the power or jurisdiction of the Supreme Court to order the cause to

be sent up by appeal or writ of error or "certiorari or otherwise."

5. On this appeal the order of the Supreme Court to send up a complete record by writ or order of certiorari will bring the whole case into the Supreme Court, and subject it to "review and determination" as fully and effectually as if such an order had been made on the petition of the appellants under paragraph 3 of rule 37.

6. This case is not made "final" under the sixth section of the act of March 3, 1891, and the right of appeal exists and is preserved by the last paragraph in that section. In all cases where the want of jurisdiction in the inferior court, either to determine the cause or to proceed to judgment upon the cause of complaint as stated, or in the absence of indispensable parties, or in the excess of jurisdiction in the decree rendered, appears affirmatively on the face of the record, the right of appeal is not abolished by the sixth section of the act of March 3, 1891.

7. The decrees that were taken by appeals from the circuit court to the circuit court of appeals were, none of them, final decrees in the cause, and no final decree has yet been rendered in this cause in the circuit court of the northern district of Georgia. The latest decree, October 15, 1898 (Record, page 72), postpones a litigation as to the rights of parties to a fund, not yet paid into court, amounting to $18,433.36, but the settlements of litigated questions as to the amount of that fund and of the liability of parties to pay it were made in decrees that were final in character, but not in fact, as to those matters. The decree for the sale of land in Georgia that is

located in *Alabama* involves a Federal question, the sale being by the marshal of the court.

The question of jurisdiction in the circuit court to render a decree in this cause, such as that of March 30, 1895, or in favor of the Galeton Cotton Mills, a corporation organized since the suit was begun, and not a party to the suit; or to decree a sale of the larger part of the mortgaged property, situate in Alabama; or to decree the sale of that property by a marshal of the court or by a commissioner appointed by the court; or any other question of jurisdiction, was not raised by demurrer, motion to dismiss, or by exception taken in the case.

The questions of jurisdiction, that appeared on the face of the record, were overlooked by the circuit court and the circuit court of appeals, and no occasion was presented for certifying the same to the Supreme Court, either on a divided opinion or as presenting a constitutional question; but it is the duty of all the courts to raise and decide such questions when they are manifest on the face of the proceedings in any case.

8. Whether these decrees were final, so as to bind the parties or the circuit court, and whether they are final so as to support an appeal from the circuit court to the circuit court of appeals, is a question of jurisdiction that is presented in this case.

If they are not "final decisions" in the circuit court, the affirmance of them, including the basic decree of March 30, 1895 (Record, page 6), in the circuit court of appeals, are extrajudicial and of none effect.

9. The power of review by the Supreme Court, which is, at least, emphasized in the statute of March 3, 1891, seems not to depend upon the finality of these decrees in the circuit court of the northern district of Georgia, and the confusion and contradictions between them strongly emphasize the necessity of a review of this entire proceeding.

XIV.

The appellants respectfully insist that the state of the record as it exists, or with the additions to it that will follow an order for a writ of certiorari to complete it, discloses errors, irregularities, and defects that show that the circuit court of the northern district of Georgia has proceeded in this cause contrary to law, to the great loss of the bondholders who are not interested in the Galeton Cotton Mills, and to the Huguley Manufacturing Company, and to William T. Huguley, and to the Alabama and Georgia Manufacturing company.

And they ask that this honorable court will review the entire case, that justice may be done therein according to law.

They also state that they rely upon the assignments of error to the several decrees and orders of the circuit court of the northern district of Georgia as they appear in the record, if this honorable court denies the writ of certiorari to complete the record; and if the certiorari is allowed, the appellants petition the court for leave to assign errors upon the entire record when the same is completed.

Appellants further move this honorable court that in connection with the certiorari to the circuit court a mandate

issue to the circuit court of appeals for the fifth circuit, directed to said court, requiring that it shall correct the clerical errors in the record of the proceedings in this cause in said court, and that said court will cause to be stated and certified to the Supreme Court of the United States the record of the proceedings in the circuit court of the northern district of Georgia, upon which this case was heard and determined by said circuit court of appeals.

The omission of the circuit court of appeals to have the papers mentioned in the stipulation of counsel identified by the minutes of the court, or in some definite way, left the record on the appeal to that court incomplete when the case was heard and determined, and it is impossible to now identify the same by reference to the records of the circuit court of appeals as they now stand.

Either the judgment rendered upon the incomplete record is void, or the record of the circuit court of appeals must be completed so as to furnish a legal foundation for the judgment.

XV.

The appellants, by leave of the court, will file with the clerk the following additional transcript of proceedings in this cause, certified, under the seal of the circuit court of appeals, on the 24th day of September, 1901, by the acting clerk of said court, the clerk thereof having died recently, and they present the same to explain the state of the record and to show that they have not been at fault in that matter:

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

THE HUGULEY MANUFACTURING COMPANY ET AL., *Appellants*,
vs.
THE GALETON COTTON MILLS ET AL., *Appellees.*
No. 798.

From the circuit court of the United States for the northern district of Georgia.

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

HUGULEY MFG. CO. ET AL., *Appellants*,
vs.
THE GALETON COTTON MILLS, *Appellees.*

The appellant in the above-stated cause comes and moves the court to direct the costs of printing the record in the above-entitled cause, including the clerk's fee for supervising the same, out of the fund in the registry of the court below, as shown by the record in said cause on file in this court, the same being the fund in controversy, except the sum of four hundred dollars, which movant expects to be able to pay, on the following grounds, to wit:

1st. Because movant is insolvent and unable to pay the same (except as to said $400.00).

2nd. Because movant has exhausted every effort to obtain money to pay for copying and printing the record, and has only been able to obtain the sum of twelve hundred dollars, eight hundred of which has been expended in having the record copied and certified to this court, all which is shown by the affidavit of W. T. Huguley, herewith filed.

3rd. Movant submits as an additional reason why this motion should be allowed that through its counsel it has

exhausted every effort to obtain the consent of counsel for appellee to abbreviate the record as sent to this court, and to obtain a written stipulation to omit certain portions thereof from the printed record, but without success, all of which is shown by the affidavit of W. R. Hammond, hereto annexed.

Feb'y 21, 1899.

(Signed) W. R. Hammond,
" J. M. Chilton,
Sol's for Appellants.

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH JUDICIAL CIRCUIT.

State of Georgia, }
Fulton County. }

The Huguley Manufacturing Company, *Appellant,* }
vs.
The Galeton Cotton Mills, *Appellee.* }

In person came before the undersigned W. R. Hammond, who, after being duly sworn, deposes and says that he is of counsel for the appellant in the above-stated cause. On the 8th day of November, 1898, deponent called on Mr. B. F. Abbott, of counsel for appellee in said cause, and asked him to consent to an abbreviation of the record and the evidence on appeal to the circuit court of appeals. Deponent found, after a brief conversation with Mr. Abbott, that he was indisposed to make any consent or to allow deponent to do anything to which he would give his attention with a view to abbreviating the evidence.

A few days previous thereto deponent had called on Mr. P. H. Brewster and asked him to enter into an agreement in reference to an abbreviation of the record and the evidence on the appeal, and Mr. Brewster told deponent that he did not have time to consider the matter and declined to

go into any negotiations with deponent on the subject whatever. Deponent asked him what he must do, and he referred deponent to Mr. Abbott, his associate, stating that he would abide by any agreement that might be made between his said associate and deponent.

Deponent then, on November 8th, 1898, addressed a letter to Mr. B. F. Abbott, of counsel for appellee, a true copy of which is attached hereto. To this letter deponent received no reply, except a verbal statement from Mr. Abbott that he could not undertake the labor necessary to an abridgement of the record. Deponent afterwards, on December 17th, 1898, addressed a letter to Mr. B. F. Abbott in reference to an abridgement of the record, a true copy of which is hereto attached.

This letter was received by Mr. Abbott, who told deponent verbally subsequently thereto that he had received the same, but that he could not make any consent to the abbreviation suggested. The agreement handed to Mr. Abbott, as stated therein, was not returned to deponent by him. Deponent further says that he made a special request of Mr. Abbott, counsel for appellant, prior to the making up of said record by the clerk, to agree to the omission of all the evidence in the case referring to the physical condition of the property in consideration of the grounds proposed, that no exception should be made to the ruling and decree of the court in refusing the claim of appellant on account of the physical condition of the property. This embraced a large part of the proofs in the cause, and would have been a very material reduction. Deponent proposed to Mr. Abbott to have the record prepared with this part eliminated and submitted to him for his examination, but Mr. Abbott said that this would be too much labor, and that he could not undertake it. Deponent has made every effort in his power to obtain a consent from counsel for appellee in reference to the abbreviation of the record, and has never been able to get them

or either of them to agree to any method by which the same might be accomplished.

Deponent attaches hereto a true copy of the agreement handed to Mr. Abbott, accompanying the letter above referred to of December 17, 1898.

Deponent further says that after said record was made up and returned to the court of appeals, to wit, on the 1st day of February, 1899, he addressed a letter to Messrs. B. F. Abbott and P. H. Brewster for the purpose of obtaining from them a stipulation as to the printed record in said cause. A copy of said letter is hereto attached and a copy of the proposed agreement which accompanied the same. Said agreement was returned to deponent by counsel for appellee without their signature and with a written memorandum thereon signed by them, which is hereto attached.

Deponent is of the opinion that said record could have been materially abbreviated, and fully one-half the cost of copying the same, as well as the cost of printing, could have been saved if deponent could have obtained the co-operation and consent of [counsel for appellee in said cause. He is of the opinion that the propositions made by him to counsel for appellee were all reasonable, and might have been complied with without any injury to appellee's side of said cause.

W. R. HAMMOND.

Sworn to and subscribed before me this the 6th day of February, 1899.

S. D. HARRIS, [SEAL.]
N. P., Fulton County, Georgia.

Hammond, Skee (obliterated) Langley, Atlanta, Ga.

NOVEMBER 8, 1898.

Hon. B. F. ABBOTT, *City.*

DEAR SIR: A few days ago I called on Mr. P. H. Brewster, associate counsel with you in the case of "The Huguley

Mfg. Co. *vs.* The Galeton Cotton Mills," and asked him to consent to an abbreviation of the record and the evidence on the appeal to the circuit court of appeals. He told me that he did not have time to consider the matter and declined to go into any negotiations on the subject whatever. I asked him what I must do, and he referred me to you, stating that he would abide by any agreement that you and I might make. Feeling confident that I might be able to obtain your co-operation, I called on you today. I found, however, after a brief conversation with you, that you were indisposed to make any consent or to allow me to do anything to which you would give your attention with the view of abbreviating the evidence.

I beg to call your attention to the following language of the circuit court of appeals in the case of "Nashua & Lowell R. Corp. *vs.* Boston & Lowell R. Corp.," in 61st Fed. Rep., p. 245:

"Considering the duty which solicitors and attorneys practicing in the Federal tribunal owe to the courts and to each other, it is to be expected that ordinarily the clerk will receive joint directions with reference to facilitating and simplifying the transcript on appeal."

As I understand you, in our interview today you were unwilling to consent to any abbreviation whatever of the transcript in this case. I desire again to make the request of you that you consent to take up the matter with me of abbreviating the transcript of the record. The evidence is very voluminous, covering nearly 1,700 pages of typewritten matter, the same being the stenographer's report. This report contains a great deal that is not evidence, as, for instance, the statements of the stenographer that the court met on certain days and giving the names of counsel for plaintiff and defendant that were present; also objections made by counsel to evidence, giving in many places the remarks of counsel, and giving also the language of the master in sustaining or overruling the objections. There is also a great deal of

the stenographer's report that is not evidence proper. Fo
instance, a question would be asked and objected to, and th
master would sustain the objection. Such matter as th
ought to be eliminated from the record by consent of counse

We have a number of sets of interrogatories that wer
asked witnesses, as expected, in which the questions pr
pounded to different witnesses are identical. We desire
stipulation from you that these questions need not be copie
but once in the record. The answers of the witnesses ca
be made just as intelligible by copying the questions one
as by copying them a dozen times. In the testimony as re
ported by the stenographer there are a great many repet
tions. Sometimes questions are asked and answered i
almost identically the same language twice. There ough
to be some way in which we might agree that mere repet
tions, either in questions or answers, might be omitted.

I am willing on my part to do the labor necessary to cur
tail this record, and request that you give me such co-opera
tion as your duty to the court, to say nothing of your duty
to opposing counsel, would prompt. It seems to be th
opinion of the court of appeals that it is the duty of counse
on both sides of the cause to aid the court in the abbrevia
tion of records as much as possible. I am willing to under
take the labor of boiling this evidence down and stating th
substance of it in much briefer form than it is stated in th
stenographer's report if you will join me in good faith and
examine this work after I have done it with the view to
giving it your consent if it shall be properly done.

I make this request of you for the purpose of conforming
to the views of the court of appeals as expressed by them in
a number of cases reported, where they indicate in strong
terms that they think counsel on both sides of the cause
should co-operate for the purpose of abbreviating the record.

As I understand you today, you were utterly unwilling to
undertake the labor of making an examination of the ab-
breviated statement of the record, and were unwilling to

consent that anything might be eliminated so as to make the record short and compendious, as it should be before the court of appeals.

Hoping to hear from you favorably in this regard, and that you will be willing to co-operate with me in endeavoring to accomplish this result, I am,

Yours truly,

(Signed) W. R. HAMMOND.

FEBRUARY 1, 1899.

Messrs. B. F. ABBOTT and P. H. BREWSTER, *City*.

GENTLEMEN: Enclosed I hand you a written stipulation as to the omission of certain parts of the record in the case of The Huguley Mfg. Co. *vs.* The Galeton Cotton Mills, appellee in the U. S. circuit court of appeals for the fifth circuit, from the printed record. Of course, our object is to get rid of the expense of printing these portions of the record which have been made up and already transmitted by the clerk. I respectfully request your attention to this matter and an early reply. If you cannot consent to the omission of all of these items from the printed record, please be kind enough to return the paper to me, indicating what portions you are willing to consent to omit. If you decline to consent to the omission of any of these papers, please return this paper to me with your refusal endorsed on the same in writing. I will thank you very much to sign the consent. I would add that all of these books and papers have been very carefully prepared in the neatest and most intelligible manner by Mr. Brown, and that none of us will find any difficulty in readily and fully understanding all of his figures.

Awaiting your early reply, I beg to remain,

Yours most truly, W. R. HAMMOND,

Of Counsel for Appellant.

U. S. CIRCUIT COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT.

THE HUGULEY MANUFACTURING COMPANY, *Appellant*,
vs.
THE GALETON MILLS, *Appellee*.

It is hereby stipulated and agreed between counsel for appellant and appellee in the above-stated case that the following portions of the record in said cause be not printed, to wit:

1. Forty-three monthly and quarterly reports, from December, 1892, to December, 1895, of the superintendent of the Galeton Cotton Mills.
2. One hundred and sixty-six pages of account sales of N. Boynton & Company.
3. The inventory made by Higgenbotham & Brown.
4. The journal of the Galeton Cotton Mills.
5. The ledger of the Galeton Cotton Mills.
6. The cotton books of the Galeton Cotton Mills.
7. The cotton books of Atkinson & Turner.
8. The cotton books of J. T. Zachry.

Each party to this agreement reserves the right to make such reference to any of said portions of the record, and to use the same, and to quote from the same in briefs and arguments as they may deem proper, just as if the same had been printed.

This February —, 1899.

J. M. CHILTON,
W. R. HAMMOND,
Attorneys for Appellants.

——— ———,
Attorneys for Appellee.

As we understand the law, the appeal will be heard and determined on the record, and we do not understand that

anything will be a part of the record in the court of appeals except such as is copied and certified by the clerk as such. The documentary evidence mentioned in the foregoing stipulation is in large part the documentary evidence offered by Galeton Cotton Mills and Robinson, trustee, in support of their defense. This being so, of course we decline to consent to the above stipulation.

This 2nd Feb., 1899.

DORSEY, BREWSTER & HOWELL,
B. F. ABBOTT,
Counsel for Galeton Cotton Mills.

Counsel for appellee cannot agree to the above and foregoing prepared stipulation. The defense set up before the master consisted in large part of the evidence contained in the books and papers mentioned above. We are clearly of opinion that it should be printed in order that the court of appeals may have it in convenient form and in compliance with the rules, as we understand it.

Feb. 6, 1899.

DORSEY, BREWSTER & HOWELL,
B. F. ABBOTT,
Att'ys for Appellee.

DEC. 17, 1901.*

Hon. B. F. ABBOTT, *City.*

DEAR SIR: Enclosed I hand you agreement in reference to copying of the cotton books of the Galeton Cotton Mills and of Atkinson & Turner, which I request you to sign and return to me. This will abbreviate the record very much, and I hope you can see your way clear to complying with our request in this regard. I have just examined these books, and they show the purchase of a large number of bales on many different days, the weight of each bale being given separately. I think you will agree with me that it is unnec-

* NOTE.—The date of the foregoing letter is evidently incorrect.

essary to set down the weight of these separate bales, and that it will only be necessary to give the aggregate number of pounds for each day. The books also show the aggregate amount of money paid for each day, and this, of course, will show the price per pound.

Awaiting your reply, I beg to remain,

Yours truly, W. R. HAMMOND.

UNITED STATES CIRCUIT COURT OF APPEALS.

J. J. ROBINSON, *Trustee*,
vs.
ALABAMA & GEORGIA MANUFACTURING COMPANY ET AL.

It is agreed between counsel for appellant and appellee that the clerk of the United States circuit court, in copying the books of the Galeton Cotton Mills and in copying the cotton books of Atkinson & Turner, introduced in evidence in the above-stated cause, may make a statement of the aggregate number of pounds of cotton purchased each day and the aggregate price paid for the same, as shown by said books on each day, omitting the separate weights of each bale and the names of the parties from whom they were bought, and also the marks and numbers of the bales.

——— ———,
Counsel for Appellants.

——— ———,
Counsel for Appellee.

U. S. CIRCUIT COURT OF APPEALS, FIFTH JUDICIAL CIRCUIT.

THE HUGULEY MFG. CO., *Appellant*,
vs.
GALETON COTTON MILLS, *Appellee*.

STATE OF LOUISIANA,
Parish ——.

In person comes before the undersigned W. T. Huguley, who, after being duly sworn, deposes and says:

That he has been personally conducting the litigation in the above-stated case for the Huguley Mfg. Co. ever since its first beginning. He holds authority from D. Jannappoulo, the president of the company, to do so, and it is through the efforts of deponent alone that the litigation has thus far been carried on.

Deponent is the largest stockholder in the Huguley Mfg. Co. and more interested than any one else.

Deponent says that he has drawn upon his own private means to conduct the litigation in the above-stated case until he has exhausted them. He has used every effort and every means in his power to procure money for the purpose of paying the expenses of copying and certifying the record and of printing the same in the above case, and he has no means whatever of paying for the printing of the record in this court. Deponent has made his calculations to be able to get the record to this court and have the same printed out of the funds that he expected to be able to collect, but he was calculating on obtaining a consent from the counsel on the other side to abbreviate the record, which consent he failed to obtain. It has practically exhausted his resources to have the long record copied and certified to this court. Deponent expects to be able to get $400.00 more, besides what has been already obtained by him, which can be used for

the printing of the record as far as it will go. He states positively that this is absolutely all the money that he will be able to procure for that purpose.

This money has not yet been paid, but he has the promise of it and hopes to be able to get it. Deponent further says that the Huguley Mfg. Co. is absolutely insolvent and has long since been out of business and has no means whatever with which to pay any costs or expenses, except such money as it may be able to recover in the present case. Said Huguley Mfg. Co. has become insolvent by reason of the result of this foreclosure proceeding.

(Signed) WM. T. HUGULEY.

Sworn to and subscribed before me Feb. 21, 1899.

——, ——.

Endorsed: Filed Feb. 21, 1899. Motion to pay for part of printing record out of fund in court, with exhibits. J. M. McKee, clerk.

CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

HUGULEY MFG. CO. ET AL. *vs.* J. J. ROBINSON. } No. 798.

And now comes appellee and suggests that the transcript of the record in the above-stated cause is incomplete in this:

The clerk of circuit court below has failed to send up certified copy of the order of the court which shows on the face that it was passed by consent, providing for the payment out of the proceeds of the mortgaged property in the registry of the court the amount of the judgment in favor of the Huguley Manufacturing Company against Galeton Cotton Mills for 2,500 dollars principal, besides interest, less certain taxed costs against that special finding, and which order also provided for the payment of 3,500 dollars to Dorsey, Brewster &

Howell and 3,500 dollars to B. F. Abbott, as solicitor for the plaintiffs below, in pursuance of decree previously rendered.

Wherefore appellee moves for order directing the clerk of the circuit court for the northern district of Georgia to certify and send up copy of said order.

P. H. Brewster,
B. F. Abbott,
Att'ys for Appellees.

Appeared B. F. Abbott, one of the attorneys for appellee, and made oath that the statements contained in the foregoing motion are true.

B. F. Abbott.

Sworn and subscribed to before me April 18, 1899.

——— ———.

We consent that the above order may be considered a part of the record.

April 18, 1899.

J. M. Chilton,
W. R. Hammond,
Counsel for Appellant.

It is also agreed that the Galeton Cotton Mills filed a petition to apply the rents and profits which were awarded by the master to the deficiency of the mortgaged debt, the same being the petition referred to in the decree of Feb. 28, 1898, as filed that day. It is further agreed that the clerk of said circuit court shall certify a copy of said petition and also said consent decree first above mentioned to this court as upon certiorari, which is waived.

April 18, 1899.

Hammond & Chilton,
Sol'rs Appellants.
P. H. Brewster,
B. F. Abbott,
Att'ys for Appellees.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

I, J. Martin McKee, acting clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing twelve pages contain a true, full, and perfect transcript of the papers filed in this court of date Feb. 21, 1899, entitled "Motion by appellant to pay for part of printing record out of fund in court, with exhibits," and "Motion suggesting diminution of the record by appellees and agreement to correct record," filed April 18, 1899, same being filed in case of Huguley Manufacturing Company *et al. vs.* Galeton Cotton Mills *et al.*, No. 798, as fully and completely as the same now remain of record and on file in this office.

In testimony whereof I hereunto subscribe my name and affix the seal of said U. S. circuit court of appeals, at the city of New Orleans, this the 24th day of September, A. D. 1901.

(Seal United States Circuit Court of Appeals, Fifth Circuit.)

J. MARTIN MCKEE,
Acting Clerk United States Circuit Court of Appeals, Fifth Circuit."

The transcript above copied is presented in connection with and in support of the motion for certiorari with a mandate to the circuit court of appeals to complete the record in this cause, so that it will show the record, or parts of the record of the circuit court in this case, upon which the hearing was had and the determination thereof was based. It shows also proper diligence and good faith on the part of the appellants in the prosecution of their rights under their appeal to said circuit court of appeals in ac-

cordance with the rules governing the preparation of records on appeals in all appellate courts.

There is no substantial merit in this case. There was no necessity for filing this bill in equity. The trustees had the power of sale under the mortgage after default in the payment of interest, on the demand of any bondholder, and if one or more of them should refuse to sell the property a court of equity would compel the sale and a conveyance by the trustees to the purchaser. Neither Huguley nor anybody ever denied or contested the mortgage. It gave them the right to continue in business, using the property, and the purchase of the equity of redemption, and the possession of the property under the sale decreed by the State court for a large sum of money, about $60,000, was to enable the company to make improvements and carry on the business. It was all done in good faith and for the benefit of the mortgaged property, and the property was purchased subject to the mortgage by the Huguley Manufacturing Company.

In the matter of the maturing of the whole debt for the non-payment of interest, it not falling due according to the contract until 1904, the evidence shows that the syndicate bondholders evaded justice by contrivance and technical excuses, really to prevent the president of the Alabama and Georgia Manufacturing Company from paying the interest due to them on January 1, 1891. The syndicate bondholders pushed their demands and refused everything except a literal compliance with their alleged right to force the maturity of the bonds if the interest was not paid on the 1st day of January, 1891. Robinson, as trustee, went into court with his bill on the 21st of January, 1891, pretending that he represented all

the bondholders and was acting under their requirements, when in fact the holders of 40 of the bonds accepted payment of the interest due them and refused to join in Robinson's declaration of the forfeiture of the rights of the mortgagor under the deed of trust. This was an unjust exaction by the trustee, who got $500 out of the mortgaged property. The only thing he did to earn that $500 that Huguley was not equally entitled to be paid for was to pervert and abuse his trust and to force the mortgaged estate to bear the enormous and unjust charges and costs of this unnecessary litigation.

When the record is complete these facts will appear in it and will be brought to the attention of the Supreme Court on a proper assignment of errors, which cannot be made until the record is complete.

JOHN T. MORGAN,
Attorney for Appellants.

The appellants submit the following list of authorities in support of the motions based upon the foregoing statements and arguments:

I.

The question of jurisdiction addresses itself to the conscience of every court, for without it judicial sentence is the most dangerous form of the usurpation of power.

Defective Transcripts and Certiorari.

1. The case of Nashua and Lowell R. R. *vs.* Boston and Lowell R. R., 61 Fed. Rep., 237, is a strong and correct presentation of the rights of parties on appeal or certiorari as to the transcript that should be sent up. The trial notes are quoted as follows:

1. *Dismissal of appeal—defective transcript—certiorari:*

1. "A clerk's certificate, which shows that certain parts of the record were omitted from the transcript by direction of appellants' attorney, is nevertheless sufficient to bar a motion to dismiss the appeal, when it does not appear that the omitted parts are 'necessary to the hearing' (C. C. A. rule 14, par. 3, 47 Fed., VII), and in such case the appellee, if he thinks the transcript defective, must resort to a certiorari or other remedy."

2. *Transcript on appeal—what to contain:*

"On an appeal in equity, in the absence of joint stipulation for simplifying the transcript, the clerk should send up the whole of the record, in the strict sense of the word, made as directed by Rev. St., sec. 750, except that, when there has been a previous appeal, matters preceding the mandate should ordinarily be omitted; and if any parts thereof are omitted,

even by joint stipulation, their nature should be indicated. But as to the proofs, entries and papers on file 'necessary to the hearing of the appeal' (Rev. St., sec. 698), the clerk, in the absence of joint stipulation, is to be guided ordinarily by the selections of the appellant's solicitor."

3. *Partial appeal:*

"It is no ground of objection that an appeal is expressly limited to a part of the decree below, when this is the only part from which the appellant could appeal; especially in view of the fact that under C. C. A., rule 11, which requires an assignment of errors to be filed simultaneously with the appeal, the legal effect may be in any case a partial appeal."

4. In Mears *vs.* Lockhart (circuit court of appeals, eighth circuit, April 10, 1899), 94 Fed., 274, the court held that—

"The evidence taken in an equity cause in a Federal court *must be made a part of the record and certified on appeal, otherwise it will be disregarded; and, unless the record contains some evidence to sustain the finding, the decree will be reversed.*"

CALDWELL, *circuit judge*, after stating case, said:

"The record fails to show any of the evidence, except the contract or agreement under which appellant claims his equitable interest in the land, and which, in connection with the answer, shows that he has an equitable interest therein; *but there is nothing whatever in the record showing upon what evidence the court below rendered a decree in favor of the appellee. On appeal from a decree in equity the record must show some evidence to sustain the findings, otherwise the decree will be reversed.*"

Citing Blease *vs.* Garlington, 92 U. S., 1.

"In the case cited, the whole subject is considered, and the proper practice settled. There being no evidence to sus-

tain the decree (in the record), it must be *reversed, and the cause remanded*, with leave to the parties to amend their pleadings as they may be advised, and to take proofs. Ordered accordingly."

II.

Federal Question.

5. *The record discloses that the sale was made in violation of the laws of the United States, by the requirements of the decree of foreclosure, thus raising a Federal question.* This question arose at the time of the filing of the suit. The power to sell real estate in Alabama by a decree of a court in Georgia to pay the mortgage debt, included the whole question of jurisdiction over the subject-matter. That was the purpose of the filing of the suit, which appears on the face of the record, and that takes it out of the operation of the statute conferring exclusive appellate jurisdiction upon the circuit courts of appeal, if that is the meaning of the act, and opens the case for a full investigation of the record. While the decisions are not expressly in point their reasoning is conclusive. The object of the act of 1891 was, in part, to to relieve the United States Supreme Court of the burden of the vast number of cases which in no way raised Federal questions, and in those cases where the courts had jurisdiction of the subject-matter and the citizenship of the parties conferred jurisdiction of the cases, the judgments and decrees of the circuit courts of appeal were made final. But in all cases where a Federal question is involved, Congress left the right of review by appeal or writ of error where it was before. There is no change as to those cases which in-

volve Federal questions. They are expressly reserved as to treaties, constitutional and statutory questions; and jurisdiction over the subject-matter, not being changed by the terms of the statute, must have been left as before the passage of the statute. This sale was made under a decree that was in plain derogation of the laws and the soverign and constitutional rights of Alabama and in violation of her statutes regulating the sale of lands by judicial proceedings and in violation of the statutes of the United States.

6. In cases involving no questions except jurisdictional questions arising out of the citizenship of the parties, it was provided by statute that certificates of jurisdiction are necessary to enable the Supreme Court to pass upon such questions.

Maynard *vs.* Hecht, 151 U. S., 324.
Colvin *vs.* Jacksonville, 157 U. S., 368.
Shields *vs.* Coleman, 157 U. S., 168.

But upon appeal, where the right of appeal is not taken away by the statute, the Supreme Court does not require the presence of a certificate of jurisdiction in order to examine into the question of jurisdiction. It has been expressly held that the jurisdictional question may appear from the terms of the decree or the order allowing the appeal (Huntington *vs.* Laidley, 176 U. S., 668).

7. The statute of 1891 provides:

"The judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different States."

This section has been construed in several cases to include those cases in which an additional ground of jurisdiction has developed in subsequent proceedings.

Amer. Sugar Refining Co. *vs.* New Orleans, 181 U. S., 277.
T. S. & S. Railway Co. *vs.* Lewis, 173 U. S., 457.
Borgmeyer *vs.* Endler, 159 U. S., 408.
Mining Co. *vs.* Turk, 150 U. S., 138.
Ex Parte Jones, 164 U. S., 691.

8. But if any other ground than that of citizenship is shown to have existed, on the face of the record, at the time the suit was instituted, the Supreme Court of the United States will, upon appeal from the United States circuit court of appeals, go not only into the question of jurisdiction, but examine fully the merits of the case.

Chappell *vs.* U. S., 160 U. S., 499, 509.
Ekui *vs.* U. S., 142 U. S., 651.
Horner *vs.* U. S., 143 U. S., 570.
U. S. *vs.* Jahn, 155 U. S., 109.
Aztec Mining Co. *vs.* Ripley, 151 U. S., 79.
So. Railway Co. *vs.* Postal Tel. Co., 179 U. S., 641.
Fla. & Cent. R. R. Co. *vs.* Bell, 176 U. S., 321.

9. In the present case the judgment of the circuit court of appeals would be final between the parties if the original jurisdiction depended solely upon the diverse citizenship of the parties to the suit, but the judgment of foreclosure and sale in this case shows upon its face that the land decreed to be sold, on which the cotton-mill plant was located, includ-

ing cotton mill and machinery and all the tenements, etc., was situated wholly within the State of Alabama, only a few detached, isolated islands being described as being in Georgia, and said plant lying wholly without the jurisdiction of the court in which the suit was instituted. The question, therefore, of jurisdiction, is one of *subject-matter* and not of parties.

III.

10. Jurisdiction of Federal Courts.

In Mansfield, etc., R'y Co. *vs.* Swan, 111 U. S., 379, 382, the Supreme Court of the United States held as follows:

"On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

In Morris *vs.* Gilmer, 129 U. S., 325, the United States Supreme Court held:

"But if the record disclose a controversy of which the court cannot properly take cognizance, its duty is to proceed no further, and to dismiss the suit; and its failure or refusal to do what, under the law applicable to the facts proved, it ought to do, is an error which this court, upon its own motion, will correct when the case is brought here for review. The rule is inflexible and without exception, as was said, upon full consideration, in Mansfield, etc., R'y Co. *vs.* Swan, 111 U. S., 382."

And the court goes on and quotes *verbatim* the extract above from that case.

11. In Vannerson *vs.* Leverett, 31 Fed. Rep., 376, Judge Speer held:

"It is never too late to consider the question of jurisdiction in the courts of the United States, and if at any time the want of jurisdiction should appear, it is the duty of the court to dismiss the case."

United States *vs.* North Bloomfield Min. Co., 53 Fed. Rep., 625.

12. *Respecting the "effect of want of jurisdiction,"* Mr. Desty says:

"If the record on its face shows a want of jurisdiction, advantage may be taken of the defect by motion at any stage of the proceedings."

Coal Co. *vs.* Blatchford, 11 Wall., 172.
The *Cassius*, 2 Dall., 365.
Municipal Inv. Co. *vs.* Gardiner, 62 Fed., 954.
Blythe *vs.* Hinckley, 84 Fed., 246.

13. *The want of jurisdiction of a court of equity to foreclose a mortgage upon lands situated beyond the territorial jurisdiction of the court, and to sell those lands under its decree, is radical and absolute, and may be suggested at any stage of the proceedings by counsel, or may be noticed by the court ex proprio motu.*

Mansfield, etc., R'y Co. *vs.* Swan, 111 U. S., p. 379.
Parker *vs.* Ormsby, 141 U. S., 81.
Grace *vs.* American Com. Ins. Co., 109 U. S., 278.

It is an elementary principle of jurisdiction that a court sitting in one State, whether State or Federal, cannot fore-

close a mortgage on and decree a sale of land situated in another State.

Boyce *vs.* Grundy, 9 Peters, 275.

Northern Ind. R. R. Co. *vs.* Michigan Central Railroad, 15 How., 233.

In Boyce *vs.* Grundy, *supra*, Mr. Justice Story said:

"Another objection is to that part of the decree which creates a lien upon the land in controversy lying in another State, and decrees a sale for the discharge of the lien. We are of opinion that the decree is erroneous in this respect: * * * the court had no jurisdiction to decree a sale to be made of land lying in another State by a master acting under its own authority."

14. Want of jurisdiction of this kind is absolute, and cannot be cured by waiver or consent of parties.

The *Lucy*, 8 Wallace, 307.

The *Nonesuch*, 9 *id.*, 504.

Penn. *vs.* Quicksilver Co., 10 *id.*, 553–556.

Railroad Co. *vs.* Ramsay, 22 *id.*, 327.

"It has been recently determined in America, after a full review of all the authorities, that a court of equity has no jurisdiction in cases touching land in foreign countries unless the relief sought is of such a nature as the court is capable of administering in the given case; a court of equity has not necessarily jurisdiction over a subject of ordinary equity cognizance simply because the parties are within the forum. Accordingly it was held that a court of equity sitting in and for one county in the State of Pennsylvania had no jurisdiction over a bill praying for an injunction against the defendant residing in another county, but who was temporarily within the jurisdiction of the court, for erecting a

nuisance which injured the plaintiff's land in that county; for, to give a complete remedy in such cases a court must not only restrain and prevent the continuance of the nuisance, but must order its removal and give compensation and damages for the injury already caused (Morris *vs.* Remington, 1 Parsons Eq., 387). So it seems a court has no jurisdiction to order a defendant to sell land situated in a foreign jurisdiction when the case would be otherwise within its power (Blunt *vs.* Blunt, 1 Hawks, 365)."

Story, Eq. Jur., 744*a*.

In the case of Morris *vs.* Remington, *supra*, the nuisance was a dam erected in Montgomery county affecting injuriously the plaintiff's adjoining farm in Philadelphia county. The suit for injunction was brought and the defendant served with process in Philadelphia county, so that part of the land affected as well as the parties were within the jurisdiction of the court.

15. *Proceedings to foreclose a mortgage are proceedings in rem.*

Pennoyer *vs.* Neff, 95 U. S., 734.

16. A decree of a Federal court without jurisdiction is void, even where all parties want the jurisdiction extended (M. C. & L. M. R. R. Co. *vs.* Swann, 111 U. S., 379).

It was held in L. & N. R. R. Co. *vs.* Behlmer, 169 U. S., 644, that an appeal operates as a supersedeas.

17. In California *vs.* Southern Pacific Company, 157 U. S., 229, Mr. Chief Justice Fuller, in an exhaustive review of the many intricate phases of the case, held:

"We are aware of no case in which this court has announced the conclusion that power is conferred by Congress

to authorize suits against citizens of other States joined with citizens of the same State as that of which plaintiff is a citizen * * * where there is no separable controversy or the citizens of plaintiff's State are indispensable parties." * * * "What Congress may have power to do in relation to the jurisdiction of circuit courts of the United States is not the question, but whether, where the Constitution provides that the court shall have original jurisdiction in cases in which the State is the plaintiff and citizens of another State defendants, jurisdiction can be held to embrace a suit between a State and citizens of another State, and citizens of another State and of the same State. *We are of opinion that our original jurisdiction cannot be thus extended, and that the bill must be dismissed for want of parties who should be joined, but cannot be without ousting the jurisdiction.*"

18. To same effect, see—

Nor. Indiana R. Co. *vs.* Mich. Cent. R. Co., 15 How., 233.

Fourth Nat'l Bank N. Y. *vs.* N. O. & C. R. R. Co., 11 Wall., 624.

Shields *vs.* Barrow, 17 How., 130.

Barney *vs.* Baltimore, 6 Wall., 280.

Louisville, N. A. & C. R. Co. *vs.* Louisville Trust Co., 174 U. S., 552.

Balto. & O. R. R. Co. *vs.* Wheeler, 1 Black, 286.

Rule 22 of Rules of Practice for Courts of Equity of the United States.

19. "It would be a solecism to say that the chancellor has jurisdiction to deal *in rem* where the thing against which the decree goes, and is alone the subject of and to be operated upon by it, is beyond the territorial jurisdiction of the court and not subject to its authority, and the decree, if

passed would itself be nugatory for the want of power or jurisdiction to give it effect. Chancery can have no jurisdiction where it can give no relief. Now what jurisdiction has the chancery court of Maryland over lands lying in a foreign country or in another State; and having no jurisdiction over lands so situated, what authority has it to decree a sale of them and impart to its trustee authority to go into such a State or foreign country to carry the decree into effect by making sale of them?

"It is true that where the decree sought is *in personam* and may be carried into effect by process of contempt, the court of chancery here may have jurisdiction although it may affect land lying in another State, the defendant being in Maryland, as in a case of trust or fraud or of contract, as where a bill is filed against a person in the State for the specific performance of an agreement or contract relating to land in another State. In such case the decree does not act directly upon the land but upon the defendant here."

White *vs.* White, 7 Gill & J. (Md.), 210.

IV.

Judicial Sales Governed by Lex Rei Sitæ—Local Actions—Formalities to be Observed.

20. *The Bounds of the Jurisdiction of Courts of Equity.*

"The court of chancery has no power directly to affect property out of the bounds of its jurisdiction. It acts upon the defendant by punishment for his contempt, for his disobedience of the court."

It is so both in England and America.

Boberdens *vs.* Rous, 1 Atk., 544.

Booth *vs.* Clark, 17 How. (U. S.), 333.

21. A late case in Connecticut affirms that—

"A foreclosure in the courts of the State of New York upon lands in Connecticut has no validity. The courts of each State have exclusive jurisdiction to settle the title to lands therein."

Farmers' Loan & Trust Co. *vs.* Postal Telegraph Co., 55 Conn., 334.

This was a case wherein the Postal Telegraph Company had mortgaged all its property situated in several States, including New York and Connecticut.

The court said:

"We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of the court by authority of law in another jurisdiction. The most that can be done is to allow foreign courts having juris liction of the parties to compel conveyance by the owner and recognize as valid title so acquired."

22. "*Every State has the right to regulate the transfer of property within its limits.*"

Hervey *vs.* Rhode Island Locomotive Works, 93 U. S., 664; 23: 1003.

Green *vs.* Van Buskirk, 7 Wall., 139; 19: 109.

S. C., 5 Wall., 307; 18: 599.

23. "The laws of the State in which land is situated control exclusively its descent, devise, alienation, and transfer, and the effect and construction of instruments intended to convey it."

United States *vs.* Fox, 94 U. S., 315.

United States *vs.* Crosby, 7 Cranch, 115.

Clark *vs.* Graham, 6 Wheat., 577.

Kerr *vs.* Moon, 9 Wheat, 565.

McCormick *vs.* Sullivant, 10 Wheat., 192.

Watkins *vs.* Holman, 16 Pet., 25.
Oakey *vs.* Bennett, 11 How., 33.
Suydam *vs.* Williamson, 24 How., 427.
McGoon *vs.* Scales, 9 Wall., 23.
Brine *vs.* Hartford Ins. Co., 96 U. S., 627.
Amer. & For. Ch. Union *vs.* Yount, 101 U. S., 352;
Jones *vs.* Habersham, 107 U. S., 174.

24. "No title to lands can be acquired or passed unless according to the laws of the State in which they are situated."
Clark *vs.* Graham, 6 Wheat., 597.

"The law of the place governs as to the formalities necessary to the transfer of real property, whether testamentary or *inter vivos*."
Robertson *vs.* Pickrell, 109 U. S., 608; 27: 1049.

25. In Desty's Federal Procedure, vol. 1 (9th ed.), sec. 87, pages 412, 414, the following well-settled rules are laid down:

"*The circuit court of one State has no jurisdiction beyond the limits of the State.*"
Boyce *vs.* Grundy, 9 Pet., 275.
Miss. and M. R. R. Co. *vs.* Ward, 2 Black., 485.
Northern Ind. R. Co. *vs.* Mich. Cent. R. Co., 15 How., 233.

"A court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory."
Picquet *vs.* Swan, 5 Mason, 35; Fed. Cas. No. 11,134.
Ex parte Graham, 3 Wash. C. C., 456; Fed. Cas. No. 5657.

"Whatever may be the extent of the jurisdiction over the subject-matter in a suit, in respect to jurisdiction over

persons and property, it can only be exercised within the limits of the judicial district."

Toland *vs.* Sprague, 12 Pet., 300.

Picquet *vs.* Swan, 5 Mason, 35; Fed. Cas. No. 11,134

"Suits which concern realty cannot be maintained unless the land lies within the district."

Northern Ind. R. R. Co. *vs.* Mich. Cent. R. Co., 15 How., 233.

Livingston *vs.* Jefferson, 1 Brock, 203; Fed. Cas. No. 8411.

Picquet *vs.* Swan, 5 Mason, 35; Fed. Cas. No. 11,134.

Ex parte Graham, 3 Wash. C. C., 456; Fed. Cas. No. 5657.

"Nor to decree a sale of lands in another State by a master acting under authority."

Boyce *vs.* Grundy, 9 Pet., 275.

Watts *vs.* Waddle, 1 McLean, 200; Fed. Cas. 17,295.

See Lyman *vs.* Lyman, 2 Paine, 11; Fed. Cas. No. 8628.

26. To same effect, see—

Farmers' Loan and Trust Co. *vs.* Postal Tel. Co., 55 Conn., 334.

Jones on Mortgages, § 1444.

Lynde *vs.* Columbus C. R'y Co., 57 Fed., 993.

Black on Judgments, vol. 2, sec. 872.

Works on Courts and Their Jurisdiction, pp. 53–55, sec. 15, reviewing Burnley *vs.* Stevenson, 24 Ohio St., 474, 478; 15 Am. Dec., 201; citing Page *vs.* McKee, 3 W. P. D. Bush, 135; 96 Am. Dec., 201.

27. In Thatcher *vs.* Duval, 50 Ind., 30, it was held that a sale made by virtue of an execution issued on a judgment ob-

tained in the United States court could not be executed in a county other than that in which the premises were situated.

To same effect, see—

Morrell *vs.* Ingle, 23 Kansas, 32.
Baker *vs.* Casey, 19 Mich., 220.
Ulshafer *vs.* Stewart, 71 Pa., 170.
Monges *vs.* Oyster, 4 W. & S. (Pa.), 20.
Finley *vs.* S. C. Canal, etc., 2 Rich. Law, 567.

28. By statutory enactment in nearly all the States all sales of realty must be held at the court-house in the county in which the property is situated.

12 Ency. Plead. & Pract., 40; citing also—
Anniston Pipe Wks. *vs.* Williams, 106 Ala., 334.
Sessions *vs.* Peay, 23 Ark., 39.
Smith *vs.* Morse, 2 Cal., 524.
Longworthy *vs.* Featherstone, 65 Ga., 165.
Union Bank *vs.* Smith, 3 An., 147.
Koch *vs.* Bridges, 45 Miss., 247.
Morse *vs.* Bell, 45 Mo., 333.
Biggs *vs.* Brickell, 68 N. C., 239.
Hickey *vs.* Behrens *et al.* cases, 74 Tex., 488.

29. And where a sale is made by virtue of an execution from the United States court, the State law directing the place of sale governs.

12 Pl. & Pract., 41; citing—
Smith *vs.* Cockrell, 6 Wall., 756.
Wayman *vs.* Southard, 10 Wheat., 1.
Sinclair *vs.* Stanley, 64 Tex., 67.
Cassiday *vs.* Norris, 49 Tex., 613.
Moody *vs.* Moeller, 72 Tex., 635.

30. A sale of realty held at an improper place is void.

Koch *vs.* Bridges, 45 Miss., 247.
Mayers *vs.* Carter, 87 N. C., 146.
Sinclair *vs.* Stanley, 64 Tex., 67.
Tippett *vs.* Nise, 30 Tex., 362.
Brown *vs.* Christi, 27 Tex., 75.
Peters *vs.* Cator, 6 Tex., 554.
Howard *vs.* North, 5 Tex., 290.
Grace *vs.* Garnett, 38 Tex., 157.

31. *In Smith vs. Cockrell, 6 Wall., 756, it is held as follows:*

"*But, a sale by a marshal not conforming to the mode of proceeding in levying the execution, and making the sale, to the State practice, is irregular and void, and a deed by him on such sale conveys no title.*"

32. In Desty's Fed. Procedure, vol. 1 (9th ed.), section 84, it is said:

"It is the duty of the Federal appellate court to take notice of its own motion, that the record does not show jurisdiction in the court below, and thereupon to remand the cause."

Grand Trunk R'y Co. *vs.* Twitchell, 21 U. S. App., 45; 60 Fed., 371.
Snead *vs.* Sellers, 30 U. S. App., 8; 66 Fed., 371.
St. Louis, I. M. & S. R'y Co. *vs.* Newcomb, 12 U. S. App., 503; 56 Fed., 951.
Horne *vs.* Geo. H. Hammond Co., 155 U. S., 393.

33. In Metcalf *vs.* Watertown, 128 U. S., 586, Mr. Justice Harlan held:

"And whether the court had or had not jurisdiction is a question which we must examine and determine, even if the

parties forbear to make it, or consent that the case be considered upon its merits."

Mansfield, etc., R'y Co. *vs.* Swan, 111 U. S., 379, 382.
King Bridge Co. *vs.* Otoe County, 120 U. S., 225.
Blacklock *vs.* Small, 127 U. S., 96, 105.
Cameron *vs.* Hodges, 127 U. S., 322, 326.
Hilton *vs.* Dickinson, 108 U. S., 165.
New Orleans Nat'l Bk. Ass'n *vs.* N. O. Mut. Ins. Co., 102 U. S., 121.
Börs *vs.* Preston, 111 U. S., 252.
Mordecai *vs.* Lindsay, 19 How., 199.

V.

34. *Jurisdiction as to Parties in Interest.*

"The circuit court cannot make a decree in the absence of the party whose rights are necessarily affected thereby. The objection may be taken on the hearing below, or in the appellate court.

Coiron *vs.* Millaudon, 19 How., 113; 15: 575.

The arrangement of parties in this cause was a fraud on the jurisdiction of the court.

35. If W. T. Huguley, who was a co-trustee with Robinson (complainant in the original suit), had been joined as a complainant, the court would have been without jurisdiction. On one side of the case, as complainants, would have been Robinson, a citizen of Alabama, and Huguley, a citizen of Georgia, and on the other a citizen (and corporation) of the State of Georgia.

But instead of joining Huguley as a complainant he was made a defendant. Does this cure the jurisdictional defect?

If the suit had been brought by the *bondholders*, the beneficiaries of the trust, it is possible the trustees, if they had been made parties at all, would have been regarded as *nominal* parties, whether they had been joined as plaintiffs or defendants.

But when the trust is attempted to be enforced by the trustees in the absence of the beneficiaries as parties, *all* of the trustees are absolutely necessary parties.

McRea *vs.* Branch Bank, 19 How., 376.
O'Hara *vs.* McConnell, 93 U. S., 150.
Thayer *vs.* Life Ass'n, 112 U. S., 717.
American Bible Soc'y *vs.* Price, 110 U. S., 61.
Foster's Fed. Prac., vol. 1, page 130.

Being thus a necessary party, the citizenship of the trustee is material and is to be determined, not by the position on the record which the pleader has chosen to assign him, but by his real attitude to the controversy.

In Arrapahoe Canal Co. *vs.* K. P. R'y Co., 4 Dill., 277, (Justice Miller delivering the opinion), a stockholder brought his suit to compel an accounting between his own corporation and another. His own corporation he made a defendant, it being alleged there, as in effect alleged here, that it was dominated adversely.

It *was held* that, although the corporation was a defendant on the record, its interests and those of the complainant were identical, and that the controversy was really one between the complainant *and his corporation*, on the one side, and the accounting corporation, on the other.

But, whether he was technically adversely interested or not, W. T. Huguley was a trustee and made a party as such. As a trustee, his interest *was with his co-complainant*, and he was, to all intents and purposes, when the line was drawn as required in the decisions quoted, on the *plaintiff's side of the controversy*. That being so, the controversy could not be said to be one where all the parties on one side were citizens of different States from all the parties of the other.

The decisions cited have been reaffirmed as late as 151 and 156 U. S., and it will be found recognized in Shearson *vs.* Littleton, 105 Fed., 533. It was denied to be applicable in that case, however, because the defendant there was a merely nominal party.

The case cited—The Arrapahoe Canal Co.—it is said in Dillon on the Removal of Causes, "anticipated in its reasoning and result the decision of the Supreme Court in the Removal causes (the Removal Causes, 100 U. S., 457.)" (Dillon on Removal of Causes, page 39, sec. 25.)

Besides the removal causes, the same principle is decided in—

Harter *vs.* Kernochan, 103 U. S., 562.

Pacific R. R. *vs.* Ketchum, 101 U. S., 289.

Barney *vs.* Latham, 103 U. S., 205.

Carson *vs.* Hyatt, 118 U. S., 279, 286.

Brown *vs.* Murray, Nelson & Co., 43 Fed., 614.

Old Colony Trust Co. *vs.* Atlanta R'y Co., 100 Fed., 798.

Tug River Coal & Salt Co. *vs.* Brigel, 67 Fed., 625.

The proposition, as approved in the foregoing authorities, is thus stated:

"In determining between whom the controversy really exists, the court is not bound by the title of the cause, or by the form of the pleadings, but should examine the record, ascertain the matter in dispute, and arrange the parties on opposite sides of the same *according to the facts*, no matter what their technical place as plaintiffs or defendants may be."

We submit that no sufficient reason is alleged in this cause for making Huguley a defendant instead of a complainant. It is not stated that he had ever been requested to act or had refused to act, but *only* that he was adversely interested. He was not really, as matter of *law*, adversely interested. Whatever interest he had was as a purchaser under the State sale, and this is shown to have been *in full recognition of and subordination to the trust.*

36. Forty of the bonds, aggregating $20,000 in amount, secured by the mortgage in this case were excluded from benefits by the decrees in the case that were secured to the others, and the holders and owners of none of them were made parties to the suit.

In Ribon *vs.* Railroad Co., 6 Wall., 450, it is said:

"But if the interests of those present and of those absent are *inseparable*, the obstacle is *insuperable*. * * *

"The rule, as we have stated it, is well settled in equity jurisprudence."

Citing—

Caldwell *vs.* Taggart, 4 Pet., 190.
Story *vs.* Livingstone, 13 *id.*, 359.
Marshall *vs.* Beverley, 5 Wheat., 313.
Coy *vs.* Mason, 17 How., 580.
Russell *vs.* Clark's Ex'rs, 7 Cranch, 69.

"The *trustees* in the five mortgages, which were foreclosed, should have been made parties. *Their* presence as such was *indispensable.*

"If the sale should be annulled they might be in the situation of the plaintiff who collects a judgment which is afterwards reversed. He may be called upon to refund and compelled to do so. A question would also arise whether the consideration of the agreement under which the five and a half millions of bonds were paid had not failed, and whether all the bondholders and stockholders who participated in the proceeds of the sale should not be required to refund. If either or both were too numerous for all to be brought before the court, *some might have been made parties in their own behalf and as the representatives of the others.*"

Story's Eq. Plead., 7th ed., secs. 120, 121, 128, 131, 132, and notes.

"The bill in *this* respect is *fatally defective,*" etc.

37. In one of the first opinions ever rendered in this suit by Judge Newman, viz., upon "taxation of counsel fees, etc.," he said:

"This bill was filed because of non-payment of interest, which, under the contract, gave the right to foreclose, and a serious question was made by the pleadings and the proof in the case whether or not the right to foreclose existed at the time the bill was filed. * * * No right can be claimed here in this respect because of any liability incurred by the trustee in the performance of his duties, because it appears from the evidence that the trustee required an agreement that he should not be responsible for counsel fees before he would *allow the use of his name* in the suit; and the case has really more the appearance of the holders of these obligations proceeding through the trustee, *as a mere nominal party,* than the act of a trustee in the discharge of the duty incumbent

upon him by virtue of a trust which he had assumed and agreed to carry out, etc."

1st Printed Record, pp. 158, 159.

38. "The rule in equity as to parties defendant is that all those whose interests will be affected by the decree sought to be obtained must be before the court; and if any such persons cannot be reached by process, the bill must be dismissed."

Ribon *vs.* Chicago, etc., R. R. Co., 16 Wall., 446; 21: 367.

"Where a decree can be made as to those present without affecting the rights of those who are absent, the court will proceed; but if the interests of those present and of those absent are inseparable, the objection of the absence of the latter is insuperable.

"The absence of parties whose rights would be in effect determined, even though they might not be technically bound, in subsequent litigation in some other tribunal, is sufficient to prevent the Supreme Court of the United States from proceeding to dispose of the case in the exercise of its original jurisdiction."

California *vs.* Southern Pac. Co., 157 U. S., 229; 39: 683.

39. "Although the averment as to citizenship may be sufficient, yet if it appear that that averment is *untrue*, it is the duty of the circuit court to dismiss the suit; and this court, on appeal or writ of error, must see to it that the jurisdiction of the circuit court has *in no respect been imposed upon*."

Morris *vs.* Gilmer, 129 U. S., 315, 325.

Nashua Railroad *vs.* Lowell Railroad, 136 U. S., 356, 374.

Cameron *vs.* Hodges, 127 U. S., 322, 325.

Williams *vs.* Nottawa, 104 U. S., 209. (See also 104 U. S., 450.)

"As remarked in Bernard's Township *vs.* Stebbins, 109 U. S., 341, 353, it has been the constant effort of Congress and of this court to prevent the discrimination in respect to suits between citizens of the same State and suits between citizens of different States, established by the Constitution and laws of the United States, from being evaded by bringing into the Federal courts controversies between citizens of the *same* State."

Anderson *vs.* Watt, 138 U. S., p. 694.

40. "Judgment of circuit court will be reversed by the Supreme Court of the United States for a defective averment of citizenship, upon its own motion, and the case remanded."

Denny *vs.* Pironi, 141 U. S., 121; 35:657.

Anderson *vs.* Watt, 138 U. S., 694; 34:1078.

41. The appeal to the Supreme Court from the last decree or judgment of the circuit court of appeals had the effect to stop further litigation in the circuit court of the northern district of Georgia until it is determined.

Draper *vs.* Davis, 102 U. S., 370.

Ensminger *vs.* Powers, 108 U. S., 292.

Keyser *vs.* Farr, 105 U. S., 265.

Citizens' Bank of Wichita *vs.* Farwell, 56 Fed., 539.

Marvin *vs.* Lawler, 91 Fed., 693.

102 U. S., 370; 108 U. S., 293, 302, 303.

105 U. S., 265; 56 Fed. Rep., 539.

91 Fed. Rep., 693.

VI.

42. In the decree of foreclosure, March 30, 1895, the "owner" of the property was given no time within which to redeem, and the owner was the Huguley Manufacturing Company, which was held to be such in the opinion of the circuit court of appeals in this cause.

The capture of this mortgaged property by the Galeton Cotton Mills, which in the beginning had no other *raison d'être*, has been at the expense of justice and a cruel expenditure in costs, charges, and fees that should never have been imposed upon the property and the bondholders by the act of the trustee. It has caused the circuit court to sell property over which it had no jurisdiction, and to convey the same by the deed of a commissioner of the court.

It ordered an account of rents and profits to be taken by Felder, special master, and decreed their payment to the mortgage debt, but forced the sale of the property, against objection, before that account could possibly have been taken to ascertain the amount due for rents and profits from the Galeton Cotton Mills, that represented a syndicate of part of the bondholders.

The sale of the property so made was "confirmed in all respects" by the decree of the court overruling exceptions thereto on the 25th of June, 1896, "to L. Lanier, trustee for the holders of the bonds," with a *placebo* to the Huguley Manufacturing Company, which was taken away by subsequent decrees of the court. This sale was again affirmed in the decree rendered on the 23d of February, 1898 (Record, page 47), and again on the 11th of April, 1898 (Record, page

56); and the proceeds of the sale of May 5, 1896, under the decree of March 30, 1895, were applied to the mortgage debt and costs, charges, and expenses by the decree of the court rendered June 4, 1898. On the 15th of October, 1898, the sale of May 5th, 1896, was again confirmed and a deed ordered to be made to L. Lanier in his own right, or to his appointee, on the payment into court, in cash, of $43,433.36, thus giving to him the benefit of the rents and profits due from the Galeton Cotton Mills, as ascertained and allowed by the previous decrees of the court, and leaving the bondholders, who were unwilling to follow further his plan of capturing the property, to litigate for their rights under the mortgage. Lanier and those who still followed him thus got an absolute deed to the property, freed of all incumbrance, and were allowed all the costs and expenses of the suit, including Robinson's fees, to stand as a charge against the fund to be paid into court by Lanier. This was a total departure from and perversion of the decree of March 30, 1895, thrice affirmed by the circuit court and twice affirmed by the court of appeals.

This tergiversation raises a Federal question as to the force of the statutes of the United States as to the sale of real estate under decrees of foreclosure, and as to the power of a circuit court to disobey the mandate of the circuit court of appeals.

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